U.S. Court of International Trade

Slip Op. 19–47

CANADIAN SOLAR INTERNATIONAL LIMITED et al., Plaintiffs and Consolidated Plaintiffs, and SHANGHAI BYD CO., LTD. et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00173
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's determination in the third administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: April 16, 2019

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David John Craven, Sandler, Travis & Rosenberg, PA, of Washington, DC, for Ningbo Qixin Solar Electrical Appliance Co., Ltd.

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Jonathan M. Freed, Trade Pacific, PLLC, of Washington, DC, argued for Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; and Trina Solar (U.S.) Inc. With him on the brief was *Robert George Gosselink*.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, DC, for SolarWorld Americas, Inc. With him on the brief were *Laura El-Sabaawi* and *Usha Neelakantan*.

Neil R. Ellis, Sidley Austin, LLP, of Washington, DC, for Yingli Green Energy Holding, Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Shenzhen Yingli New Energy Resources Co., Ltd.; Yingli Green Energy International Trading Co., Ltd.; Yingli Green Energy Americas, Inc.; and Yingli Energy (China) Co., Ltd. With him on the brief were *Richard L.A. Weiner, Rajib Pal, David P. Lyons, Shawn M. Higgins*, and *Justin R. Becker*.

Tara Kathleen Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades*, Assistant Director. Of Counsel on the brief was *Mercedes C. Morno*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court are several motions for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Commerce" or "the Department") determination in the third administrative review of the antidumping duty ("ADD") order on crystalline silicon photovoltaic products, whether or not assembled into modules, from the People's Republic of China ("the PRC"). *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 82 Fed. Reg. 29,033 (Dep't Commerce June 27, 2017) (final results of [ADD] administrative review and final determination of no shipments; 2014–2015) ("*Final Results*") and accompanying Issues and Decision Mem. for the Final Results of the 2014–2015 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From [the PRC], A-570–979, (June 20, 2017), ECF No. 44–5 ("Final Decision Memo").

For the reasons that follow, the court sustains Commerce's selection of surrogate values for aluminum frames, nitrogen, polysilicon ingots and blocks, and financial ratios. The court also sustains Commerce's decision to include import data with reported zero quantities in its calculation of surrogate values and its decision to exclude Trina U.S.'s debt restructuring income as an offset to its indirect selling expenses. The court remands Commerce's selection of surrogate value for module glass, Commerce's application of an adverse inference in calculating Canadian Solar's dumping rate, and Commerce's rejection of Ningbo Qixin Solar Electrical Appliance Co., Ltd.'s ("Qixin") separate rate application.

BACKGROUND

On February 9, 2016, Commerce initiated the third administrative review of the ADD order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the PRC, for which the period of review would be December 1, 2014 through November 30, 2015. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 6,832, 6,835 (Dep't Commerce, February 9, 2016). On March 28, 2016, after determining that it would not be practicable to examine individually each company for which a review was initiated, Commerce selected Canadian Solar International Limited[1] and the collapsed entity of Trina Solar, comprised of Changzhou Trina Energy Co., Ltd. and Trina Solar

[1] Commerce initially selected Canadian Solar International Limited, Respondent Selection Mem. at 5–6, PD 155, CD 104, bar code 3452853–01 (Mar. 28, 2016), but subsequently

(Changzhou) Science and Technology Co., Ltd.[2] as mandatory respondents. *See* Respondent Selection Mem. at 6, PD 155, CD 104, bar code 3452853–01 (Mar. 28, 2016).[3]

On December 22, 2016, Commerce published the preliminary results of the third administrative review. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From [the PRC]*, 81 Fed. Reg. 93,888 (Dep't Commerce Dec. 22, 2016) (preliminary results of [ADD] administrative review and preliminary determination of no shipments; 2014–2015) ("*Preliminary Results*") and accompanying Decision Mem. for Prelim. Results of the 2014–2015 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, From [the PRC], A-570–979, PD 499, bar code 3530538–01 (Dec. 16, 2016) ("Prelim. Decision Memo").

On June 27, 2017, Commerce published the final determination. *See Final Results*, 82 Fed. Reg. at 29,033. Commerce selected Thailand as the primary surrogate country for valuing the mandatory respondents' factors of production ("FOP"), *see generally* Final Decision Memo, and adopted surrogate values for, *inter alia*, semi-finished polysilicon ingots and blocks, aluminum frames, module glass, nitrogen, and overhead and financial expenses. Final Decision Memo at 21–22, 35–38, 45–50, 52–55, 66–71. Commerce applied partial AFA in calculating Canadian Solar International Limited's antidumping margin due to the failure of unaffiliated solar cell and solar module suppliers to provide FOP information. Final Decision Memo at 15–18. Commerce excluded Trina U.S.'s debt restructuring income from its

determined that the following companies were affiliated and should be treated as a single entity for the purposes of the administrative review: Canadian Solar International Limited, Canadian Solar Manufacturing (Changshu), Inc., Canadian Solar Manufacturing (Luoyang), Inc., CSI Cells Co., Ltd., CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd., and CSI Solar Power (China) Inc. *See* Decision Mem. for Preliminary Results of the 2014–2015 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, From [the PRC] at 6, A-570–979, PD 499, bar code 3530538–01 (Dec. 16, 2016) ("Prelim. Decision Memo"); *see also* Affiliation & Single Entity Mem. for Canadian Solar International Limited at 8, PD 516, CD 582, bar code 3533001–01 (Dec. 16, 2016).

[2] Commerce initially selected the collapsed entity of Changzhou Trina Solar Energy Co., Ltd. and Trina Solar (Changzhou) Science and Technology Co., Ltd., but subsequently determined the following companies were affiliated and treated them as a single entity: Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science and Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd. Final Decision Memo at 2 n.3; *see also* Prelim. Decision Memo at 1.

[3] On October 26, 2017, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF No. 44–2–3. Citations to the administrative record documents in this opinion are to the numbers assigned to the documents by Commerce in these indices. References to the public administrative record are in the form of "PD," and references to the confidential administrative record are in the form of "CD."

calculation of Trina's U.S. indirect selling expense ratio. *Id.* at 84–85. Commerce included in the average unit surrogate value calculations import data with reported quantities of zero, finding "no basis to conclude that the zero quantity import data . . . are errors or that these zero quantity imports result in unreliable and distortive [surrogate values]." Final Decision Memo at 86–87. Finally, Commerce rejected Qixin's separate rate application and assigned it the China-wide rate. Final Decision Memo at 90–92.

On July 7, 2017, Plaintiffs Canadian Solar International Limited; Canadian Solar (USA), Inc.; Canadian Solar Manufacturing (Changshu), Inc.; Canadian Solar Manufacturing (Luoyang), Inc.; CSI Cells Co., Ltd.; CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd.; and CSI Solar Power (China) Inc. (collectively, "Canadian Solar") commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).[4] Summons, July 7, 2017, ECF No. 1; Compl., July 7, 2017, ECF No. 8. Canadian Solar moves for judgment on the agency record, challenging three aspects of the *Final Results*. Specifically, Canadian Solar challenges: 1) Commerce's application of partial AFA with respect to missing supplier information; 2) Commerce's use of import data under Thai Harmonized Tariff Schedule ("HTS") 7007.19.90000 to value Canadian Solar's module glass consumption; and 3) Commerce's use of import data under Thai HTS 2804.30.00000 to value its nitrogen consumption. *See* Mem. Points & Authorities Supp. Mot. J. Agency R. at 10–41, Mar. 7, 2018, ECF No. 54–1 ("Canadian Solar's Br.").

This action was consolidated with actions brought by Qixin, Shanghai BYD Co., Ltd. ("BYD"), Changzhou Trina Solar Energy Co., Ltd. et al. ("Trina"),[5] SolarWorld Americas, Inc. ("SolarWorld"),[6] and Sunpreme Inc. *See* Order, Sept. 26, 2017, ECF No. 41.[7] Consolidated Plaintiffs and Plaintiff-Intervenors filed motions for judgment on the

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[5] The following parties are plaintiffs in the action Changzhou Trina Solar Energy Co., Ltd. v. United States, Ct. No. 17–00197, which has been consolidated with the present action: Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; and Trina Solar (U.S.) Inc.

[6] SolarWorld is a Defendant-Intervenor in the present action, as well as each of the consolidated actions other than SolarWorld Americas, Inc. v. United States (Ct. No. 17–00200), in which it is the plaintiff.

[7] The court's September 25, 2017 order consolidated the following cases under the present action: Ningbo Qixin Solar Electrical Appliance Co., Ltd. v. United States, Ct. No. 17–00187; Shanghai BYD Co., Ltd. v. United States, Ct. No. 17–00193; Changzhou Trina Solar Energy Co., Ltd. et al. v. United States, Ct. No. 17–00197; SolarWorld Americas, Inc. v. United States, Ct. No. 17–00200; and Sunpreme Inc. v. United States, Ct. No. 17–00201. Order,

agency record, Mot. J. Agency R., Mar. 7, 2018, ECF No. 52; Pls.' R. 56.2 Mot. J. Agency R., Mar. 7, 2018, ECF No. 55; Mot. J. Agency R., Mar. 7, 2018, ECF No. 56; [SolarWorld's] Mot. J. Agency R., Mar. 7, 2018, ECF No. 57; Mot. J. Agency R., Mar. 7, 2018, ECF No. 60, each challenging various aspects of Commerce's *Final Results*. *See* Mem. Supp. Mot. J. Agency R. Submitted by Pl. Pursuant to R. 56.2 R. U.S. Ct. Int'l Trade, Mar. 7, 2018, ECF No. 52–1 ("Qixin's Br."); Mem. Supp. Mot. [Trina] J. Agency R., Mar. 7, 2018, ECF 55–1 ("Trina's Br."); [SolarWorld's] Mem. Supp. R. 56.2 Mot. J. Agency R., Mar. 8, 2018, ECF No. 63 ("SolarWorld's Br."). Specifically, Qixin challenges Commerce's denial of its separate rate application in the *Final Results* after omitting any reference to Qixin in the *Preliminary Results*. Qixin's Br. at 6–15. Trina challenges: 1) Commerce's use of Thai import data to value nitrogen; 2) Commerce's use of Thai import data to value module glass; 3) Commerce's decision to include in its calculation of surrogate values import data with no corresponding quantities; and 4) Commerce's exclusion of Trina U.S.'s debt restructuring income in its calculation of Trina's U.S. indirect selling expense ratio. Trina's Br. at 4–19.[8] SolarWorld challenges: 1) Commerce's selection of Thai HTS 7604.29.90001 data to value the respondents' aluminum frames; 2) Commerce's surrogate value selection for module glass; 3) Commerce's selection of Styromatic's 2015 financial statements as best available information to calculate the respondents' overheard, selling, general and administrative expenses, and profit; and 4) Commerce's surrogate value selection for respondents' semi-finished polysilicon ingots and blocks. SolarWorld's Br. at 10–32.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an [ADD] order. "The court shall hold

Sept. 26, 2017, ECF No. 41. Sunpreme Inc.'s action was severed from the present consolidated case on March 8, 2018. *See* Order, Mar. 8, 2018, ECF No. 61 (severing Ct. No. 17–00201 from Consol. Ct. No. 17–00173).

[8] As separate rate respondents in the third administrative review, Consolidated Plaintiff-Intervenors Yingli Green Energy Holding Co., Ltd.; Yingli Green Energy Americas, Inc.; YIngli Energy (China) Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Shenzhen Yingli New Energy Resources Co., Ltd.; and Yingli Green Energy International Trading Co., Ltd. (collectively "Yingli") and Plaintiff-Intervenor and Consolidated Plaintiff-Intervenor BYD support the arguments made by Canadian Solar and Trina. Mot. J. Agency R. at 2, Mar. 7, 2018, ECF No. 56; Mem. Supp. R. 56.2 Mot. J. Agency R. Pl.-Intervenor & Consol. Pl.-Intervenor [BYD] at 9–10, Mar. 7, 2018, ECF No. 60–1.

unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Plaintiffs and Consolidated Plaintiffs challenge a total of five of Commerce's surrogate value determinations in the *Final Results* and raise four additional challenges. The court first addresses the arguments that Commerce's surrogate value selections for module glass, aluminum frames, nitrogen, semi-finished polysilicon ingots and blocks, and overhead, selling, general and administrative expenses, and profit are contrary to law and/or unsupported by substantial evidence. The court then addresses the arguments regarding the application of partial AFA, the decision to include import data with reported zero quantities in the calculation of surrogate values, the exclusion of Trina's debt restructuring income in its calculation of Trina's U.S. indirect selling expense ratio, and the rejection of Qixin's separate rate application in the *Final Results*.

I. Surrogate Value Selection

Plaintiff and Consolidated Plaintiffs challenge Commerce's surrogate value selection for module glass, aluminum frames, nitrogen, semi-finished polysilicon ingots and blocks, and overhead, selling, general and administrative expenses, and profit as unsupported by substantial evidence. The court addresses each of these challenges in turn.

A. Module Glass

Trina argues that Commerce's selection of tempered glass under Thai HTS 7007.19.90000 over float glass under Thai HTS 7005.29.90001 to value Trina's module glass was unsupported by substantial evidence because the float glass classification specified the thickness of module glass consumed by Trina. *See* Trina's Br. at 2, 12–14. SolarWorld argues that Commerce's selection of Thai import data for tempered glass over laminated glass was unsupported by substantial evidence because tempered glass fails to account for the additional surface treatments of module glass. *See* SolarWorld's Br. at 3, 19–21.[9] Canadian Solar argues that Commerce's selection of the Thai data for tempered glass is unsupported by substantial evidence

[9] In SolarWorld's response to the arguments of the plaintiffs and consolidated plaintiffs that Commerce's valuation of module glass was unreasonable, SolarWorld states that it "believes Commerce's surrogate valuation of module glass should be affirmed." *See* Resp. Br. of Def.-Int. SolarWorld Americas, Inc. at 29, July 31, 2018, ECF No. 73 ("SolarWorld's Resp."). SolarWorld does not clarify whether in making this statement it intended to abandon its

because the Thai data used by Commerce was aberrational. *See* Canadian Solar's Br. at 3, 19–31.[10] Defendant responds that Commerce's decision is reasonable, as the Thai import data for tempered glass satisfied all of Commerce's surrogate value criteria and was not aberrational. *See* Def.'s Resp. Opp'n Pl.'s Mot. J. Agency R. at 6, 12–21, July 30, 2018, ECF No. 71 ("Def.'s Br."). For the reasons that follow, Commerce's selection of tempered glass over float glass and laminated glass is reasonable. Commerce's decision to use the Thai import data for tempered glass, however, is unsupported by substantial evidence and is remanded to Commerce for further consideration.

Where the subject merchandise is exported from a nonmarket economy country, Commerce calculates normal value based on FOPs. 19 U.S.C. § 1677b(c)(1). Commerce uses "the best available information" to value the FOPs, *id.*, and has discretion to determine what constitutes the best available information, as this term is not defined by statute. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). However, Commerce must ground its determination in the objective of the statute: to calculate accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *see also Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007). Commerce generally selects surrogate values that are publicly available, are product specific, reflect a broad market average, and are contemporaneous with the period of review. *Qingdao Sea–Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Apr. 11, 2019) ("*Policy Bulletin 04.1*"). Commerce's practice is to avoid using aberrational values as surrogate values. *See generally Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19, 1997).

In this review, Canadian Solar reported using solar module glass, and Trina reported using coated glass and tempered glass (collectively, "module glass"), as FOPs. *See* Final Decision Memo at 45. The record contained Thai import data for tempered glass (HTS 7007.19.90000), float glass (HTS 7005.29.90001), and laminated glass

claim that the laminated glass subheading should have been used to value the respondents' module glass input. As SolarWorld restates in its reply its argument that Commerce's selection of tempered glass subheading to value module glass "substantially undervalued this input," the court understands SolarWorld to not have abandoned its challenge to Commerce's use of the tempered glass subheading. *See* Reply Br. of Pl. SolarWorld Americas Inc. at 9–10, Oct. 5, 2018, ECF No. 84.

[10] Trina joined and incorporated Canadian Solar's arguments with respect to the unreliability of Commerce's selected surrogate value data. *See* Trina's Br. at 14.

(HTS 7007.29.90). *Id*. Here, Commerce reasonably selected tempered glass as the best available information to value the respondents' module glass inputs because record information and the respondents' descriptions indicated the module glass consumed by the respondents was tempered. *See* Final Decision Memo at 45–46. Commerce reasonably determined the laminated glass subheading was not the best available information because laminated glass is composed of "multiple layers of glass and plastic" and there was no evidence that such properties are present in the respondents' module glass inputs. *See* Final Decision Memo at 46–47.

SolarWorld maintains that Commerce's choice of tempered glass as a surrogate value substantially undervalued the module glass input because only laminated glass captures the additional costs associated with the surface treatments used on the respondents' module glass to increase its strength, safety, and durability. *See* SolarWorld's Br. at 19–21. SolarWorld's argument fails, however, as SolarWorld does not provide any evidence establishing that this surface treatment is comparable to the layering of laminated glass. *See* Final Decision Memo at 47.

Commerce also reasonably selected tempered glass over float glass to value Trina's module glass input because, although the float glass subheading more closely aligned with the thickness of Trina's input, the tempered glass subheading's lack of specification as to thickness indicated that it covered all thicknesses, including that consumed by Trina. Final Decision Memo at 46. Trina maintains Commerce failed to weigh the comparative importance of thickness against other factors in favor of selecting tempered glass. *See* Trina's Br. at 13. However, it is clear from Commerce's explanation that Commerce gave significant weight to the description by the parties that their module glass was tempered. *See* Final Decision Memo at 45–46. It is also clear that Commerce gave weight to the fact that the tempered glass subheading did not exclude the products with a thickness matching Trina's input. *See* Final Decision Memo at 45–46. The court will not reweigh the evidence, and Trina's argument thus fails.

However, while Commerce's choice of the tempered glass subheading to value Trina's and Canadian Solar's module glass is supported by substantial evidence, Commerce failed to provide a reasonable explanation as to why the Thai import data for tempered glass was not distorted by a small quantity of unusually costly imports from Hong Kong. Hong Kong imports accounted for only 0.4% of the total volume of Thai import data but constituted 60.2% of the total value of Thai imports during the period of review. *See* Final Decision Memo at

49; *see also* Thai Tempered Glass [attached as Ex. FR-1 to Canadian Solar's Oct. 31, 2016 Submission], PD 463–64, bar code 3518110–01 (Oct. 31, 2016). The average unit value ("AUV") for tempered glass imported into Thailand was $2.79 with the Hong Kong data, whereas excluding the Hong Kong data results in an AUV of only $1.11. *Id*.

The court addressed this same issue in *SolarWorld II* in the proceedings concerning the second administrative review of the ADD order covering crystalline silicon photovoltaic cells. *See* Canadian Solar's Br. at 22–24; *see also* Canadian Solar's Reply Br. at 5; *see also SolarWorld Americas, Inc. v. United States*, 42 CIT __, 320 F. Supp. 3d 1341 (2018) ("*SolarWorld II*"). In *SolarWorld II* the Court ordered Commerce to further explain on remand why Commerce's selection of Thai import data for tempered glass was reasonable in light of record evidence that imports from Hong Kong made up only 1.6% of the total volume but accounted for 75% of the total value. *See SolarWorld II*, __ CIT at __, 320 F. Supp. 3d at 1354–55. The court held that it was not clear that Commerce had established a consistent practice of only assessing whether a surrogate value was aberrant in the aggregate, and that regardless, even if it was a consistent practice, Commerce had failed to explain how that practice was reasonable in light of the concerns raised by the Hong Kong imports as to the accuracy of the Thai data as a whole. *See id.*, 320 F. Supp. 3d at 1352–56 (noting Commerce's reliance on Issues and Decision Mem. For the Final Results of the 2012–2013 Admin. Review of Multilayered Wood Flooring from [the PRC] at 41–43, A–570–970 (July 8, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–17368–1.pdf (last visited Apr. 11, 2019) ("Wood Flooring")). Commerce's remand redetermination abandoning the use of the Thai data for tempered glass was later sustained. *See SolarWorld Americas, Inc. v. United States*, 42 CIT __, 355 F. Supp. 3d 1306 (2018). The reasoning in *SolarWorld II* applies with equal force to the present proceedings.[11]

[11] SolarWorld argues that *SolarWorld II* is not relevant because in that case "the court appears to have been principally concerned with Commerce's citation of, and reliance on, [Wood Flooring], which did not appear to support the agency's characterization of its practice of considering AUV data in the aggregate." *See* SolarWorld's Resp. at 25. In the remand results considered in *SolarWorld II*, Commerce sought to rely on Wood Flooring as evidence that it was Commerce's practice only to consider the aggregate AUV of a data source in assessing whether it is aberrational. *See SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1353. The court observed, however, that Wood Flooring did not evidence a practice of assessing allegedly aberrational data only in the aggregate, because in Wood Flooring Commerce explained why the allegedly aberrational inputs were representative of market prices by assessing the share each input represented of the aggregate data. *See SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1353.

SolarWorld correctly notes that in these proceedings Commerce does not seek to rely on Wood Flooring as evidence of a practice of only assessing allegedly aberrational data in the aggregate. SolarWorld's Resp. at 25. SolarWorld America's argument fails, however, as the

Commerce argues that the "relevant test is to determine whether the AUV in aggregate is aberrational,"[12] as otherwise "parties would advocate the manipulation of data by removing one or more lines they find objectionable." Final Decision Memo at 47. As in *SolarWorld II*, although this approach may be reasonable in other cases, it is not reasonable on this record without further explanation.[13] *See SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1355.

Commerce unreasonably found that the Hong Kong imports were not low in quantity because Hong Kong ranged fourth in terms of quantity out of 22 countries from which Thailand imported tempered glass. Final Decision Memo at 49. Hong Kong imports account for only 0.4% of the total volume of imports of tempered glass into Thailand. The mere fact that there are other countries which repre-

court in *SolarWorld II* was not solely concerned with Commerce's reliance on Wood Flooring. Here, as in Wood Flooring, it is not clear what reliance Commerce sought to place on this claimed practice of exclusively reviewing allegedly aberrational data in the aggregate because in these proceedings Commerce did, in fact, analyze the component elements of the Thai data to determine that the Hong Kong imports were not distortive. *See* Final Decision Memo at 49. In *SolarWorld II* the court also expressed concern with Commerce's failure to address the apparent tension between Commerce's stated preference to base surrogate values on broad data reflective of the surrogate country's market as a whole and the fact "that the Hong Kong data skews the Thai AUV in a way that renders the Thai AUV unrepresentative of the Thai market." *See SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1354.

[12] Commerce cites *Certain Hot-Rolled Carbon Steel Flat Products from Romania* as a case "where the Department explained that to test the reliability of [surrogate values] alleged to be aberrational, it is appropriate to compare the selected [surrogate value] to the AUVs calculated for the same period using data from the other designated surrogate countries." *See* Final Decision Memo at 47 (citing *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of [ADD] Administrative Review*, 70 FR 34448 (June 14, 2005) and accompanying Issues and Decision Mem. at 8–23, A-485–806, (June 6, 2005), *available at* https://enforcement.trade.gov/frn/summary/romania/E5–3067–1.pdf (last visited Apr. 11, 2019 ("Hot-Rolled Carbon"). This determination responded to challenges to data sources used in the preliminary results to calculate surrogate values for a wide range of FOPs. *See* Hot-Rolled Carbon at 19–23. It did not, however, directly address the question of whether the distortive impact of component items on the total average cost of a surrogate value can be considered if that component is alleged to be aberrational. Hot-Rolled Carbon does not, therefore, evidence a consistent practice of exclusively considering allegedly aberrational data in the aggregate.

[13] In this case, imports from Hong Kong account for only 60.2% of the total value of Thai imports of tempered glass, as opposed to 75% in *SolarWorld II*. *See SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1354; *see also* Canadian Solar's Br. at 24. However, the component of imports from Hong Kong accounts for only 0.4% of the total quantity of imports of tempered glass into Thailand, as against 1.6% in *SolarWorld II*. *See SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1354; *see also* Canadian Solar's Br. at 24. As such, on a per-unit basis the Hong Kong imports in the present proceeding show a much greater deviation from the AUV than in *SolarWorld II*. In this case the Hong Kong imports have an AUV of $413.10 as against a total AUV of $2.79, Canadian Solar's Reply at 3, while in *SolarWorld II* the Hong Kong imports had an AUV of $191.47 as against a total AUV of $4.14. *See SolarWorld II* , 42 CIT at __, 320 F. Supp. 3d at 1352 n.11; *see also SolarWorld Americas, Inc. v. United States*, 273 F.Supp.3d 1254, 1263 (CIT 2017) (stating the AUV of the component of imports from Hong Kong was $191.47). Accordingly, the distortive impact of Hong Kong imports is more significant on a per-unit basis in the present proceedings than in SolarWorld II.

sent an even smaller fraction of the imports into Thailand does not impact whether the imports from Hong Kong are of low volume.

Commerce also unreasonably concluded that the Hong Kong imports were not aberrational through reliance on benchmarks based on imports of negligible quantity from Denmark, France, Switzerland, and Mexico. Final Decision Memo at 49. These four other countries exported tempered glass to Thailand at prices equivalent to, or greater than, the Hong Kong imports. *Id*. The total import quantities from Denmark and France in the period of review were only 12 kilograms or less, while an import quantity of zero was recorded for Mexico and Switzerland. *Id*. These amounts are a negligible component of the total of approximately 2.26 million kilograms of tempered glass imported into Thailand in the period of review. *See* Thailand Import Data [attached as Ex. 2 to SolarWorld's Initial Surrogate Value Comments] at 2, PD 365–382, CD 424–436, bar code 3489132–01 (July 19, 2019). Substantial evidence requires Commerce to address evidence that supports its finding as well as that which "fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). Commerce notes the negligible volume of imports from these countries but fails to address the potentially distortive effect of the benchmarks' minuscule import quantities. Final Decision Memo at 49. It is unreasonable to rely on benchmarks that are exclusively based on negligible import quantities without addressing the impact this negligible volume has on the reliability of the benchmarks. *See Blue Field (Sichuan) Food Industrial Co., Ltd. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1311, 1327–28 (2013) (holding as unsupported by substantial evidence a finding by Commerce that a surrogate value was not aberrational because, inter alia, that finding was made in reliance on benchmarks based on "miniscule import volumes").[14] Commerce's finding that tempered glass imports

[14] Commerce used Thai data from the second administrative review as a benchmark against which to assess the Thai data for tempered glass from the present period of review. Final Decision Memo at 47–8 (citing Decision Mem. for the Final Results of the 2013–2014 [ADD] Admin. Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from [the PRC], A-570–979, (June 13, 2016) *available at* https://enforcement.trade.gov/frn/summary/prc/2016–14532–1.pdf (last visited Apr. 11, 2019) ("Solar Cells AR2 Memo")). Canadian Solar argues that it was unreasonable for Commerce to use Thai data from the prior administrative review as a benchmark because Commerce's use of this value was remanded by the Court. *See* Canadian Solar's Br. at 26–27; *see also SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1354–55. Defendant responds that the Court did not conclude in *SolarWorld II* that the relevant Thai import data was aberrational or otherwise unusable for benchmarking purposes. Def.'s Br. at 20. As discussed above, *SolarWorld II* ordered Commerce to provide further explanation as to why its use of Thai import data for tempered glass as a surrogate value was reasonable in light of record evidence that imports from Hong Kong made up only 1.6% of the total volume but accounted

from Hong Kong are not aberrational through comparison with improperly vetted benchmarks based on negligible quantities is thus unsupported by substantial evidence.

Commerce's selection of the Thai data is remanded for further explanation of why its selection is reasonable in light of the fact that imports from Hong Kong only accounted for 0.4 % of the total volume of Thai imports, but constituted 60.2 % of the average import value during the period of review. The AUV of imports of tempered glass

for 75% of the total value. *See SolarWorld II*, 42 CIT at __, 320 F. Supp. 3d at 1354–55. In those proceedings the Court did not face the question of whether it was appropriate to use such data as a benchmark. The judgment sustaining Commerce's later remand redetermination abandoning the use of the Thai data for tempered glass is currently under appeal. *See* Appeal No. 2019–1591, Feb. 26, 2019, ECF No. 165 (SolarWorld Americas, Inc. v. United States, Consol. Ct. No. 16–00134); Appeal No. 2019–1593, Feb. 26, 2019, ECF No. 166 (SolarWorld Americas, Inc. v. United States, Consol. Ct. No. 1600134). The court cannot say that it is unreasonable for Commerce to use Thai data from the prior administrative review as a benchmark in this review.

Nonetheless Canadian Solar also argues it was unreasonable of Commerce to only use Thai data from the second administrative review ($4.14 per kilogram) as a benchmark without also considering historical data from the first administrative review ($0.98 per kilogram) and initial investigation ($0.86 per kilogram). *See* Canadian Solar's Br. at 26–27 (citing Solar Cells AR2 Memo at 29–31). Defendant responds that Canadian Solar waived this argument because it failed to raise it at the administrative level. Def.'s Br. at 19. Defendant further argues that a comparison with the earlier administrative proceedings does not indicate that the Thai data for the present proceedings is aberrational. *Id.* When assessing whether surrogate value data is aberrational, Commerce's practice is to compare the surrogate value data with record data from other potential surrogate countries, as well as to examine "data from the same HTS category for the surrogate country whose data are allegedly aberrational over multiple years to determine if the current data appear aberrational compared to historical values." Final Decision Memo at 47. Commerce did not consider the data available in the Solar Cell AR2 Memo for the first administrative review and initial investigation. *See* Solar Cells AR2 Memo at 29–30 & n.144–45. "The determinative question [regarding administrative exhaustion] is whether Commerce was put on notice of the issue." *Trust Chem Co. v. United States*, 35 CIT __, __ n.27, 791 F. Supp. 2d 1257, 1268 n.27 (2011). In its case brief Canadian Solar argued that the Thai data is aberrational and stated it is Commerce's "normal practice to examine relevant price information on the record, including any appropriate benchmark data, in order to accurately value the input in question." Case Brief of [Canadian Solar] at 29, PD 560, CD 594, bar code 3561659–01 (Apr. 10, 2017) ("Canadian Solar's Case Br."). Canadian Solar only sought to compare the Thai data to data from Bulgaria during the period of review and to Canadian Solar's market economy purchases of module glass. *Id.* at 29–32. The issue of a comparison with historical data from Thailand was not waived, however, because in responding to Canadian Solar's argument Commerce stated its practice is to examine data from the surrogate country "over multiple years." Final Decision Memo at 47. While Commerce only referred to price data from the second administrative review, it cited the Solar Cells AR2 Memo which also contained price data for the first administrative review and the initial investigation. *See* Final Decision Memo at 47 n.237. Commerce did not provide any explanation as to why it chose to compare the Thai data for the period of review of the present investigation only against the second administrative review and omit consideration of earlier historical data. *See* Final Decision Memo at 47–48. Commerce's failure to explain why it did not consider data from the first administrative review and the initial investigation is unreasonable and appears inconsistent with its stated practice. Commerce's apparent inconsistency with past practice is not cured by Defendant's argument that the earlier data does not establish that the Thai data for tempered glass in the present period are aberrational. On remand Commerce is directed to explain its decision not to consider data from the first administrative review and initial investigation.

from Hong Kong into Thailand ($413.10 per kilogram) is nearly 150 times greater than the AUV of all tempered glass imports into Thailand (including imports from Hong Kong) ($2.79 per kilogram). *See* Canadian Solar's Reply at 3. Commerce's current explanation for not disaggregating data is that it simply does not do so as a matter of policy. It justifies its policy on the grounds of administrative burden and to avoid potentially distortive manipulation of import data. Final Decision Memo at 47, 54 (citing Polyethylene Terephthalate Film, Sheet, and Strip from [the PRC]: Issues and Decision Mem. for the Final Results of the 2011–2012 Admin. Review at 12, A-570–924, (June 5, 2013), *available at* https://enforcement.trade.gov/frn/summary/prc/2013–13985–1.pdf (last visited Apr. 11, 2019); *see also SolarWorld II* 42 CIT at __, 320 F. Supp. 3d at 1354–1355. Commerce's justification may be sufficient for most cases. At some point, however, input data may diverge so significantly from other input data that it renders the data set, as a whole, unreliable. Ideally, Commerce, not the court, should identify where that point lies. For module glass, the distortive input data has reached the point where the court cannot say that Commerce selection is reasonable.[15]

B. Aluminum Frames

SolarWorld challenges Commerce's valuation of the respondents' aluminum frames using Thai HTS 7604.29.90001, which covers non-hollow aluminum profiles. *See* SolarWorld's Br. at 11–19; *see also* Final Decision Memo at 35–38. SolarWorld contends that Commerce's selection is contrary to law and not supported by substantial evidence, arguing that the selection is not in accordance with the HTS, fails to account for the additional manufacturing processes that the frames in question undergo, and runs contrary to CBP rulings on the merchandise in question. SolarWorld's Br. at 11–19. Defendant responds that Commerce's decision is reasonable because Thai HTS 7604.29.90001 represents the most specific proposed surrogate value

[15] Commerce also reasonably declined to compare the Thai import data for module glass against Canadian Solar's market economy purchases. Final Decision Memo at 48. Canadian Solar argues that Commerce unreasonably rejected this data even though it was the best available information on the record to act as a benchmark and Commerce had not identified any evidence that undermined its reliability. Canadian Solar's Br. at 31. Canadian Solar's argument fails as Commerce reasonably explained that its practice is to not use a respondent's market economy purchase price as a benchmark because such information is not public and not necessarily reflective of industry-wide prices. Final Decision Memo at 49.

Canadian Solar also asserts that Commerce should have used the AUV of the float glass subheading as a benchmark against which to assess whether the AUV for Thai imports of tempered glass were aberrational. *See* Canadian Solar's Br. at 20; Canadian Solar's Reply at 9–10. Canadian Solar's argument fails, however, as Canadian Solar did not substantiate why it was unreasonable for Commerce to decline to use data relating to an entirely different HTS subheading as a benchmark against which to assess Thai imports of tempered glass.

on the record. Def.'s Br. at 23. For the reasons that follow, Commerce's selection of import data under HTS 7604.29.90001 is supported by substantial evidence.

As discussed above, where the subject merchandise is exported from a nonmarket economy country, Commerce calculates normal value based on FOPs. 19 U.S.C. § 1677b(c)(1). Commerce selects a surrogate value by which it values the FOPs and makes that selection "based on the best available information regarding the values of such factors in a market economy country or countries." *Id.* Although Commerce has broad discretion in deciding what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (noting the absence of a definition for "best available information" in the ADD statute), it must ground its selection of the best available information in the overall purpose of the statute, which is to calculate accurate dumping margins. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191; *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007). Commerce considers the best available information to be (1) specific to the input; (2) tax and import duty exclusive; (3) contemporaneous with the period of review; (4) representative of a broad market average; and (5) publicly available. *See Policy Bulletin 04.1*.[16]

Here, Commerce reasonably concluded that import data under HTS 7604.29.90001, which covers non-hollow aluminum profiles, constitutes the best available information to value Trina's aluminum frames. *See* Final Decision Memo at 35–38. Commerce noted that Trina sufficiently demonstrated that the aluminum frames in question are non-hollow, aluminum profiles, and that Commerce found no evidence on the record to contradict this description. Final Decision Memo at 35. Moreover, as in the underlying investigation, Commerce emphasized that HTS 7604 presents the best available information to value the inputs in question because it covers alloyed aluminum profiles, whereas HTS 7616.99.90—suggested by SolarWorld—comprises an "other" subheading that includes dissimilar products. *Id.* Commerce reasoned that HTS 7616 applied to completely different products than the aluminum frames at issue because this heading includes products like "nails, tacks, staples, screws, bolts, nuts, screw hooks, rivets, cotters, cotter pins, washers, knitting needles, bodkins, crochet hooks, embroidery stilettos, safety pins, other pins and

[16] To the extent possible, Commerce uses "the prices or costs of [FOPs] in one or more market economy countries that are--(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. §§ 1677b(c)(4)(A)–(B). Commerce also has a regulatory preference for valuing all FOPs using surrogate value data from a single surrogate country where practicable. 19 C.F.R. § 351.408(c)(2) (2014).

chains, and cloth, grill and netting of aluminum wire." Final Decision Memo at 37–38. Based on the inclusion of such unrelated items, Commerce reasonably concluded that HTS 7616.99.9909 does not constitute the best available information. Additionally, Commerce reasonably determined that HTS 7604's descriptions, such as "[a]luminum bars, rods and profiles," indicate that the subheading used—HTS 7604.29—includes non-hollow aluminum profiles, such as those listed by Trina. *Id.* at 35. Given these explanations, Commerce's determination that HTS 7604 is more specific than the available alternatives on the record is supported by substantial evidence.

SolarWorld's argument that evidence specific to this review renders the selection of HTS 7604.29 unreasonable is unpersuasive. *See* SolarWorld's Br. at 11, n.3. SolarWorld first argues that the aluminum frames should not be valued using HTS 7604 because the HTS defines aluminum bars, rods, or profiles as having "a uniform cross section along their whole length . . ., [sic] provided that they have not thereby assumed the character of articles or products of other headings."[17] SolarWorld's Br. at 11–12 (citing Ex. SC-17 [attached to Trina's Sec. C Suppl. Questionnaire Resp.] at SuppC-24, PD 286–287, CD 314–319, bar code 3480083–02 (June 21, 2016)). SolarWorld cites to an exhibit showing a drawing of the frame as evidence that the frames cannot fit the definition of HTS 7604, but Commerce reasonably concluded that the drawing in question shows "a single, uniform cross section," thus countering SolarWorld's argument. *See* Final Decision Memo at 36. SolarWorld offers no evidence to counter this determination. Moreover, Commerce's task is not to classify the solar frame inputs for customs purposes, but to select the best available information to value the FOPs in question. *See* 19 U.S.C. § 1677b(c)(1). SolarWorld fails to proffer evidence detracting from Commerce's conclusion that the frames are more similar to the goods under HTS 7604 than any other data on the record.

SolarWorld also argues that the aluminum frames in question cannot be categorized as aluminum profiles due to the extent to which the product undergoes further processing. SolarWorld's Br. at 12–14.[18] According to SolarWorld, the fact that "Trina's aluminum frames are fabricated products that have been further manufactured into a finished and final form" makes them not properly classifiable as alumi-

[17] Specifically, SolarWorld asserts that the record demonstrates that Trina's aluminum solar frames are [[ ]] SolarWorld's Br. at 11–12.

[18] For example, SolarWorld argues that the aluminum frames undergo a [[ ]] resulting in [[ ]], SolarWorld's Br. at 12–13, and that the frames "undergo multiple fabrication processes to complete them for final use, such as drilling, cutting, punching, bending, coating, and stamping before assembly with solar cells and backing materials." *Id.* at 13.

num profiles under HTS 7604.29.90001.[19] SolarWorld's Br. at 14. The argument fails, however, given that HTS 7604 does not specify whether it covers finished or unfinished aluminum profiles, as Commerce explained. Final Decision Memo at 37. Moreover, the International Trade Commission's ("ITC") definition of aluminum profiles applies to goods "that have been *subsequently worked after production*. . . provided that they have not thereby assumed the character of articles or products of the other headings.'" *See* Final Decision Memo at 36 (emphasis in original, quoting *Jiangsu*, 38 CIT __, __, 28 F. Supp. 3d 1317, 1337 (2014)). It is also reasonably discernible from Commerce's reference to the ITC's definition of profiles as covering goods "which have been subsequently worked after production," Final Decision Memo at 35, that the work performed on the profiles underscored by SolarWorld is not sufficient to render Trina's aluminum profiles more similar to the finished products covered by a different subheading. SolarWorld proffers no evidence detracting from Commerce's determination.

Finally, SolarWorld cites two CBP rulings, N139353 and N238208, which classify aluminum frames for solar panels under HTS 7616.99.5090 and HTS 8541.90.0000, respectively, to support its argument that HTS 7604 is not the best available information. *See* SolarWorld's Br. at 15–18. Commerce correctly noted, however, that it is not bound by CBP rulings for U.S. imports when selecting import values from surrogate countries, but rather should select the best available information on the record. Final Decision Memo at 37. Moreover, Commerce correctly pointed out that HTS 7616.99 covers an "other" subheading, which would solely comprise aluminum articles not already identified elsewhere. *Id.* Additionally, Commerce noted that the CBP rulings did not provide explanations for why the selected headings were appropriate, thus precluding Commerce from weighing the ruling against evidence on the record. *Id.* In light of Commerce's response, as well as the evidence relied upon by Commerce, the decision to select HTS 7604.29.9001 is reasonable.

C. Nitrogen

Commerce valued Trina's and Canadian Solar's nitrogen inputs using Thai import data under HTS 2804.30.00 (i.e, Hydrogen, rare

[19] SolarWorld also argues that CBP rulings classifying unfinished aluminum articles under HTS 7604 detract from Commerce's conclusion that the aluminum frames in question are best valued under HTS 7604. SolarWorld's Br. at 16–17. The argument is unavailing, however, given that Commerce did not find that HTS 7604 applied exclusively to finished aluminum profiles. Final Decision Memo at 37. "The fact that HTS category 7604 has been applied in the past to unfinished articles does not support the conclusion that Thai HTS category 7604 covers solely unfinished merchandise that is different in nature and value from the aluminum frames at issue." *Jiangsu*, 38 CIT __, __, 28 F. Supp. 3d 1317, 1337.

gases and other non-metals; Nitrogen). Final Decision Memo at 52. Trina and Canadian Solar argue that Commerce's selection of the Thai import data is unsupported by substantial evidence because this data is aberrational and unreliable. *See* Canadian Solar's Br. at 31–39; Canadian Solar's Reply Br. at 12–15; Trina's Br. at 4–12; Trina's Reply Br. at 2–11. In the alternative, Canadian Solar argues that if Commerce uses the Thai import data, then input data from the United States and Switzerland included in the Thai data should be excluded as distortive. *See* Canadian Solar's Br. at 39–41; Canadian Solar's Reply Br. at 16–17. Defendant responds that Commerce reasonably determined that the Thai import data was not aberrational or unreliable, and that Commerce's selection is supported by substantial evidence. *See* Def.'s Br. at 26–31.

When analyzing whether data is aberrational, Commerce generally compares that data to (1) the AUV of data on the record for other countries at a level of economic development comparable to the nonmarket economy in question, and (2) the AUV for that input in the country at issue in prior years. Final Decision Memo at 53. Commerce's practice is to view data based on small quantities as not inherently distorted. *Id.* at 54.

Commerce's comparison of the Thai data to data from other economically comparable countries and from the past review reveals that this data is within the range of the relevant benchmarks as defined by Commerce's practice. Final Decision Memo at 53. Commerce compared the Thai import data and the import data available on the record for five other countries economically comparable to the PRC and found the Thai data fell within the range of the other AUVs. *Id.* at 53. Specifically, the Thai AUV ($9.36) was greater than the AUVs of three other countries on the record (Bulgaria with $0.08, Romania with $0.08, and Mexico with $0.25), but lower than the remaining two countries (South Africa with $26.27, Ecuador with $17.16). *Id.* at 53. Commerce also concluded that the mere fact that the volume of Thai imports was lower than the volume of imports from each of Bulgaria, Romania and Mexico did not, in and of itself, demonstrate distortion. *Id.* at 54.

Commerce also concluded that a comparison with the nitrogen AUV in the prior administrative review did not indicate that the Thai data was aberrational. Final Decision Memo at 54. The AUV for nitrogen in the Thai import data in the prior administrative review was $11.68, around 19% higher than in the present review. *Id.* at 54. Accordingly, Commerce's determination that the Thai import data is not aberrational is reasonable.

Canadian Solar argues that high value imports from the United States and Switzerland distort the value of Thai imports and should be excluded. *See* Canadian Solar's Br. at 39–41; Canadian Solar's Reply Br. at 16–17. Imports from these two countries account for 1.57% of imports into Thailand during the POR but comprise 22.6% of the total value of Thai imports. Canadian Solar's Br. at 39. Commerce reasonably declined to disaggregate the Global Trade Atlas ("GTA") data for nitrogen and exclude the imports from the United States and Switzerland on the basis of its preference for using a full dataset to avoid "cherry-picked import data in a[] [surrogate value] calculation." Final Decision Memo at 54. While Commerce's policy of not disaggregating data may not be reasonable in all circumstances, the court cannot say that Commerce's refusal to disaggregate the GTA data for nitrogen in this case is unreasonable. The AUV of nitrogen imports from the United States and Switzerland is around fifteen times greater than the AUV of all nitrogen imports into Thailand (including imports from the United States and Switzerland). *See* Final Decision Memo at 53; *see also* Summary of Import Data for Nitrogen & Oxygen from Economically Comparable Countries [attached as Ex. 3 to SolarWorld's Rebuttal Surrogate Value Comments] at 2, PD 397–98, CD 482–84, bar code 3490795–02 (July 26, 2016). It is reasonably discernable that Commerce did not consider this degree of price variation within the Thai data as sufficient to justify disaggregation where it had already concluded that credible benchmarks exhibit significant price variation.[20] *See* Final Decision Memo at 53–54 (identifying import values for other potential surrogate countries in this period of review as ranging between $0.08–$27.27 per kilogram, and identifying price volatility between the present period of review and the prior period of review in South Africa ($26.27 vs. $5.46), Romania, ($0.08 vs. $0.13) and Ecuador ($17.16 vs. $4.84)).[21]

[20] Further, the price multiple of the U.S. and Swiss nitrogen imports is many times lower than that represented by the imports of tempered glass from Hong Kong discussed above, which were nearly 150 times the AUV for all imports of tempered glass into Thailand. *See* Section A above.

[21] Canadian Solar argues that the South African and Ecuadorian data are unsuitable as benchmarks because they have lower volumes and higher values than the data from Romania, Bulgaria and Mexico. *See* Canadian Solar's Br. at 37–39; Canadian Solar's Reply at 12–15. The South African data provides an AUV of $26.27 based on imports of 12,894 kilograms of nitrogen, while the data from Ecuador provides an AUV of $17.16 based on 6,498 kilograms of imports. *See* Summary of Import Data for Nitrogen & Oxygen from Economically Comparable Countries [attached as Ex. 3 to SolarWorld's Rebuttal Surrogate Value Comments] at 1, PD 397–98, CD 482–84, bar code 3490795–02 (July 26, 2016). In contrast, the data from Bulgaria, Romania and Mexico all provide an AUV between $0.08–25 and are drawn from volumes of between approximately 6.5–28 million kilograms. *Id.* at 1–2. Canadian Solar argues that this court has recognized that "a very small relative quantity triggers an obligation for Commerce to explain why data is not aberrational," and that Commerce did not provide any such explanation. Canadian Solar's Br. at 38; Canadian

Trina argues that Commerce unreasonably declined to use certain price quotes and invoices as benchmarks against which to assess whether the Thai import data was aberrational. *See* Trina's Br. at 6–7; Trina's Reply at 10.[22] Commerce stated that it generally does not use price quotes because it cannot verify the conditions under which the quotes were solicited and whether they have been selected from within a broader range of quotes, and because price quotes do not represent actual prices or broad ranges of data. Final Decision Memo at 52–53. Commerce also stated that it considered individual prices to

Solar's Reply at 15 (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 37 CIT __, __, Slip Op. 13–30 at 13 (2013)). Defendant argues that Canadian Solar waived the argument that the South African and Ecuadorian data are unsuitable as benchmarks by failing to raise it at the administrative level. *See* Def.'s Br. at 28. The arguments as to South Africa's and Ecuador's low volumes put Commerce on notice that the reliability of those data sources was under question due to their low volumes. *See* Canadian Solar's Reply at 13 (citing Canadian Solar's Case Br. at 38–40).

Nonetheless, Commerce explained why it did not consider the Ecuadorian and South African data aberrational. Commerce explained that where there are low import volumes but no other indication that a value is aberrational, Commerce will not treat the relevant data as aberrational. As discussed below, Commerce reasonably decided not to employ price quotes and invoices as benchmarks and reasonably decided to use the South Africa and Ecuador data as benchmarks. Final Decision Memo at 54 (citing Decision Mem. for the Final Results of the 2013–2014 [ADD] Admin. Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from [the PRC] at 29–34, A-570–979, (June 13, 2016) *available at* https://enforcement.trade.gov/frn/summary/prc/2016–14532–1.pdf (last visited Apr. 11, 2019)). It is reasonably discernible from Commerce's reasoning that it did not consider there to be any other indication that the Ecuadorian or South African data were aberrational. It is also reasonably discernible from Commerce's discussion of how Thai data falls "within the range" of other AUVs that it did not consider the mere fact that the South African and Ecuadorian data were the highest on the record to indicate those data were aberrational. Final Decision Memo at 53. Commerce thus reasonably determined that the South African and Ecuadorian data were not aberrational and were appropriate to use as benchmarks to assess the reliability of the Thai import data.

Canadian Solar further argues that the Thai data should be treated as aberrational because it diverges from credible benchmarks to a greater degree than did the data in *Frozen Warmwater Shrimp*. Canadian Solar's Br. at 33 (citing *Admin. Review of Certain Frozen Warmwater Shrimp from [the PRC]: Final Results, Partial Rescission of Sixth [ADD] Administrative Review and Determination Not to Revoke in Part*, 77 Fed. Reg. 53,856 (Sept. 4, 2012)). In *Frozen Warmwater Shrimp* Commerce found that a comparison of the AUV of shrimp feed in the relevant period of review for Thailand, the Philippines and Indonesia as against two prior administrative reviews demonstrated the Thai data was considerably more volatile than other countries for which there was record data. *See* Sixth Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Issues and Decision Mem. for the Final Results at 49, A-570–893, (Aug. 27, 2012), *available at* https://enforcement.trade.gov/frn/summary/prc/2012–21734–1.pdf (last visited Apr. 11, 2019)). Canadian Solar's comparison with *Frozen Warmwater Shrimp*, however, relies entirely on the use of price quotes and invoices as benchmarks, and the rejection of South Africa and Ecuadorian data as benchmarks. *Id.* at 53–54. As discussed above, Commerce reasonably declined to use price quotes and invoices as benchmarks, and reasonably made use of the South African and Ecuadorian data as benchmarks.

[22] Trina submitted three invoices for the purchase of nitrogen in Thailand which reflect an average price of $0.1187 per kilogram (derived from a total value of $4,598.61 and total quantity of 38,739.09 kilograms). *See* Summary of Nitrogen Values on the Record [attached as Enclosure 1 to Trina's Administrative Case Br.], PD 533, CD 588, bar code 3538946–01 (Jan. 25, 2017). Trina further provided a price quote for nitrogen in Thailand that offered a price of $0.0679 per kilogram. *Id.*

be unrepresentative of broad market averages. *Id.* at 53. Commerce's reasoning for declining to use the price quotes and prices as benchmarks is reasonable. *Id.* at 53.

Trina further argues that the Thai data should be treated as unreliable due to a "significant and inexplicable discrepancy" between the quantity and value of nitrogen imports reported from the United States into Thailand, and nitrogen exports recorded from the United States to Thailand by the ITC Dataweb. *See* Trina's Br. at 7–10; Trina's Reply Br. at 9–10. The ITC data shows that the United States exported 788,319 kilograms of nitrogen to Thailand during the period of review. *See* Analysis of U.S. Origin Nitrogen Included in Thai Imports of Nitrogen [attached as Enclosure 2 to Trina's Administrative Case Br.], PD 533, CD 588, bar code 3538946–01 (Jan. 25, 2017). By contrast, the Thai data shows that only 2,070 kilograms of nitrogen were imported from the United States during the period of review. *Id.* The U.S. data contains an AUV of approximately $0.15 per kilogram, while the AUV for the U.S. component of the Thai import data contains an AUV of approximately $140 per kilogram. *Id.* Commerce reasonably concluded, however, that country-specific export data are an inappropriate benchmark by which to evaluate corresponding import values. Final Decision Memo at 55. As Commerce explained, this is because different reporting and inspection requirements mean that each shipment of merchandise is likely to be treated differently. *Id.* (quoting Certain Activated Carbon from [the PRC]: Issues and Decision Mem. for the Final Results of the First [ADD] Admin. Review at 32, A-570–904, (Nov. 3, 2009), *available at* https://enforcement.trade.gov/frn/summary/prc/E9–27083–1.pdf (last visited Apr. 11, 2019)). Trina's argument fails as Commerce has provided a reasonable explanation for the divergence between the U.S. export data and Thai import data, and a reasonable justification for not using the U.S. export data as a benchmark by which to evaluate the Thai import data.

D. Semi-Finished Polysilicon Ingots and Blocks

In the *Final Results*, Commerce determined that the best available information by which to value the respondents' semi-finished polysilicon ingots was the international price for solar-grade polysilicon. Final Decision Memo at 21–22. SolarWorld challenges Commerce's decision, arguing that the surrogate value does not reflect the substantial additional processing and value added by turning raw polysilicon into an ingot or block. SolarWorld's Br. at 29–32. SolarWorld proposes that Commerce instead construct a cost, starting with the world-market price of raw polysilicon and adding the costs required to

produce a unit of ingot or block. *Id.* at 31–32. Defendant responds that, considering the available data on the record, Commerce reasonably chose to value respondents' ingots and blocks using a surrogate for the primary raw input. Def.'s Br. at 21–23. For the reasons that follow, Commerce's determination to value respondents' semi-finished polysilicon ingots and blocks with the world market price for raw polysilicon is reasonable.

Here, Commerce determined that the world market price for raw polysilicon constituted the best available information for valuing respondents' semi-finished polysilicon ingots and blocks. Final Decision Memo at 21–22. In the absence of data values for ingots and blocks, Commerce used a value for raw polysilicon because respondents' ingots and blocks are primarily composed of polysilicon. *Id.* With respect to SolarWorld's contention that the world market price for polysilicon is missing certain processing costs, Commerce explained that most of the processing required to produce ingots and blocks from raw polysilicon is performed by large, expensive machinery and is thus accounted for in the manufacturing costs. *Id.* Indeed, Commerce stated that the record did not present sufficient evidence to show that the additional processing stages add a significant amount of value beyond the original cost of polysilicon. *Id.* Given Commerce's decision to use a value for the main component of the good, it is reasonably discernible that Commerce viewed the option as imperfect but recognized that it would result in a more accurate surrogate value than would a value for a component that is not the main component of the good. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191. It is also reasonably discernible that Commerce determined, consistent with its practice, that the world market price for raw polysilicon is as specific as possible to the input (lacking data for the input itself), is contemporaneous, publicly available, and represents a broad market average. *See Policy Bulletin 04.1.* Commerce's determination that this value constitutes the best available information is reasonable.

E. Respondents' Surrogate Financial Ratios

In the *Final Results*, Commerce determined that Styromatic's 2015 financial statements constituted the best available information to calculate respondents' overhead, selling, general and administrative expenses, and profit. Final Decision Memo at 66–71. SolarWorld challenges Commerce's decision, arguing that Commerce should have selected the available financial statements of Thai company Ekarat Engineering Public Company Limited ("Ekarat") because Ekarat is a producer of identical merchandise, thus making it the best available information. SolarWorld's Br. at 21. Defendant responds that Com-

merce reasonably selected Styromatic's 2015 financial statements, as they constituted the best available information considering they were complete and contemporaneous with the period of review, and Styromatic's primary business is the production of comparable merchandise. Def.'s Br. at 34. For the reasons that follow, Commerce's determination is supported by substantial evidence.

As discussed, Commerce determines the normal value of the subject merchandise based on the FOPs utilized. 19 U.S.C. § 1677b(c)(1). Commerce values the FOPs using the best available information, to which it adds "an amount for general expenses and profit." *Id.* Commerce selects a surrogate value for each input from a source in a market economy country that is economically comparable to the NME country and a significant producer of the merchandise in question. *Id.* §§ 1677b(c)(4)(A)–(B); 19 C.F.R. § 351.408(b). Commerce determines the amount for manufacturing overhead, general expenses, and profit using publicly available financial data from a producer of identical or comparable merchandise. 19 C.F.R. § 351.408(c)(4). In choosing which surrogate data to use, Commerce considers "the quality and specificity of the statements, as well as whether the statements are contemporaneous with the data used to calculate production factors." Final Decision Memo at 67. Additionally, where Commerce "has reason to believe or suspect that a company may have received countervailable subsidies, financial ratios derived from that company's financial statements may not constitute the best available information." *Id.*

Commerce selected Styromatic's 2015 financial statements as the best available information because they were contemporaneous, audited, and came from a company that produced merchandise comparable to the subject merchandise during the period of review. Final Decision Memo at 71. SolarWorld asserts that Ekarat's financial statements are the best available information because the company is the only Thai manufacturer that produces identical merchandise. SolarWorld's Br. at 21. Defendant responds that Commerce reasonably explained that the majority of Ekarat's revenue comes from distribution transformers and services, which are not comparable to the subject merchandise. Def.'s Br. at 32–33.[23]

Commerce reasonably concluded that Styromatic's 2015 financial statements constituted the best available information. Although Commerce acknowledged that Ekarat's 2015 consolidated financial statements indicate that Ekarat is a manufacturer of solar modules, Commerce reasonably concluded that Ekarat is primarily a manufac-

[23] Specifically, Commerce concluded that "Ekarat's financial statements support that more than 99 percent of its revenue came from sales of distribution transformers and services, and the remaining revenue came from sales of electricity." Final Decision Memo at 68.

turer of distribution transformers. Final Decision Memo at 68. First, Ekarat's 2015 financial statements indicate that "[m]ost of the company's revenue came from the sale of Distribution Transformer," thus establishing that Ekarat was primarily engaged in the manufacturing of non-comparable merchandise during the POR. Ekarat 2015 Financial Statements [attached as Ex. 11 to SolarWorld's Initial Surrogate Value Comments] at 18, PD 365–382, CD 424–436, bar code 3489062–01 (July 18, 2016) ("Ekarat Financial Statements"). Second, the same statements indicate that in 2015, "the company had the sale revenue from sales of Distribution Transformer to the Metropolitan Electric Authority and the Provincial Electric Authority . . . in the amount of . . . Baht 267.60 million or . . . 12.92%, . . . of the Transformer revenue and Services revenue of the company." Ekarat Financial Statements at 18. From this figure, it is discernible that Ekarat made a total of 2,071.21 million baht in transformer revenue and services revenue (267.60 divided by 0.1292). The financial statements also indicate that Ekarat's total revenue for every customer sector was 2,092.12 million baht in 2015. *Id.* So, 2,071.21 million—Ekarat's 2015 transformer revenue and services revenue—is 99% of 2,092.12 million—the company's total 2015 revenue for customer sectors. Although SolarWorld argues that Ekarat can produce solar cells, *see* SolarWorld's Br. at 21–22 (citing Ekarat Financial Statements at 11), Commerce reasonably concluded that the vast majority of Ekarat's revenue comes from the sale of non-comparable merchandise and thus Ekarat should not be considered a producer of identical merchandise.[24] Final Decision Memo at 68. As Ekarat's financial statements indicate, "[m]ost of the company's revenue came from the sale of" distribution transformers. Ekarat Financial Statements at 18.[25]

[24] SolarWorld argues that Commerce's assertion that the majority of Ekarat's revenue came from distribution transformer sales is not supported by the record. SolarWorld's Br. at 22–23. SolarWorld points out that Commerce cites to page 113 of Ekarat's financial statements, which does not clearly support Commerce's assertion. *Id.* at 23. However, Commerce's assertion is reasonably discernible from the record. As described above, Ekarat's financial statements make clear that Ekarat made a total of 2,071.21 million baht in transformer revenue and services revenue in 2015. Ekarat Financial Statements at 18. Ekarat's total revenue for every customer sector was 2,092.12 million baht in 2015, *id.*, meaning that its transformer revenue and services revenue constituted 99% of its total 2015 revenue. Thus, SolarWorld's attempt to undermine Commerce's assertion that the majority of Ekarat's revenue comes from the sale of non-comparable merchandise is unavailing.

[25] SolarWorld also points to evidence that Ekarat's assets for cell manufacturing totaled 646.31 million baht, whereas its assets for transformer sales and services and for electricity were lower. SolarWorld's Br. at 22. However, Ekarat's assets for solar cell production do not establish that it is primarily a manufacturer of identical merchandise, particularly in light of evidence showing that the vast majority of revenue comes from elsewhere.

Moreover, Commerce's practice is to decline to use financial statements of companies that are not profitable, and Ekarat Solar Co., Ltd., Ekarat's subsidiary described as a solar cell producer, operated at a loss in 2015. *See* Final Decision Memo at 69 (citing Canadian Solar Rebuttal Surrogate Value Comments at Ex. SVR-1, PD 391, CD 474, bar code 3490637–01 (July 25, 2016)). Accordingly, Commerce's conclusion that Styromatic's 2015 financial statements—rather than those of Ekarat—represented the best available information is reasonable.

II. Commerce's Application of Partial AFA to Value Canadian Solar's Unreported FOPs

Canadian Solar challenges Commerce's application of partial AFA as unlawful and unsupported by substantial evidence. Canadian Solar's Br. at 10–19. Canadian Solar argues that because it cooperated with Commerce in the administrative proceedings, application of partial AFA was unlawful. *Id.* at 12–13. Canadian Solar further contends that Commerce's determination that Canadian Solar could have induced cooperation from its unaffiliated suppliers to provide FOP data was not supported by substantial evidence. Canadian Solar's Br. at 11, 13–17; *see also* Final Decision Memo at 15–18. Commerce reasoned that because the suppliers failed to cooperate by not providing the FOP information, 19 U.S.C. § 1677e(a) and (b) permit Commerce to apply AFA to account for the missing information. Final Decision Memo at 15–18. Commerce explained its use of AFA as necessary because Canadian Solar was "in a position to exercise leverage to induce cooperation from its uncooperative solar cell and solar module suppliers." Final Decision Memo at 16. For the reasons that follow, Commerce's application of partial AFA in calculating Canadian Solar's dumping margin is neither in accordance with law nor supported by substantial evidence.

To calculate accurate dumping margins, Commerce requests information from respondents. Where information necessary to calculate a respondent's dumping margin is not available on the record, Commerce applies "facts otherwise available" in place of the missing information. *See* 19 U.S.C. § 1677e(a). Where Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may apply "an inference that is adverse to the interests of that party in selecting among the facts otherwise available."[26] *Id.* § 1677e(b). A

[26] Although the statute provides separately for the use of facts otherwise available and the subsequent application of an adverse inference regarding those facts, parties often use the term "adverse facts available" or "AFA" to refer to the application of the "facts otherwise

respondent complies "to the best of its ability" where it "put[s] forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The Court of Appeals has held that Commerce may, under certain circumstances, apply AFA in calculating a cooperative respondent's antidumping margin where it finds that the respondent could have induced an uncooperative supplier's cooperation. *Mueller Comercial de Mexico S. De R.L. de C.V. v. United States*, 753 F.3d 1227, 1233–34 (Fed. Cir. 2014).

In *Mueller*, Mueller was a cooperative respondent but did not possess all the production cost information Commerce needed to calculate its antidumping margin. 753 F.3d at 1230. Commerce requested data directly from Mueller's two main suppliers, but only one supplier provided the information. Commerce used facts otherwise available pursuant to 19 U.S.C. § 1677e(a), concluding that the unavailable production cost data was related to acquisition cost data on the record. *Id.* Commerce explained

> Although premised on the adverse inference that [Mueller's uncooperative supplier's] actual cost information would not be favorable – otherwise [the supplier] may not have elected to withhold it from the Department – the selected facts available are intended to produce an accurate, non-punitive, dumping margin for Mueller.

Issues and Decision Mem. for Final Results of [ADD] Administrative Review: Certain Circular Welded Non-Alloy Steel Pipe from Mexico at 16, A-201–805, June 13, 2011, ECF No. 59 (Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States, Ct. No. 11–00319) ("Mueller IDM"). Commerce selected the most discounted transaction data from the responsive supplier, inferring that all merchandise sold to Mueller by the uncooperative supplier came at such a discount. *Mueller*, 753 F.3d at 1230. This selection enabled Commerce to calculate the uncooperative supplier's cost of production, and ultimately resulted in a higher dumping rate for Mueller. *Id.* Commerce justified its decision, in part, based on a finding that Mueller "could and should have induced" the cooperation of the uncooperative supplier, and that an adverse inference affecting Mueller was necessary to induce the uncooperative supplier's cooperation since it "could otherwise evade

available" and "adverse inferences" provisions of 19 U.S.C. § 1677e. *See, e.g.*, Final Decision Memo at 15 (explaining Commerce's approach to applying AFA when an interested party fails to cooperate by not acting to the best of its ability in responding to Commerce's requests for information).

its antidumping rate by funneling its goods through Mueller." *Id.* at 1233. Mueller challenged the final results at the U.S. Court of International Trade ("CIT"), arguing that Commerce's application of AFA was improper, given Mueller's cooperation. *Id.* at 1230–31. After the CIT sustained Commerce's determination, Mueller appealed to the Court of Appeals for the Federal Circuit.

The Court of Appeals examined whether Commerce's determination could be sustained under 19 U.S.C. § 1677e(a).[27] It held that Commerce may, under subsection (a), rely on inducement or evasion rationales where reasonable under the circumstances, and where "the predominant interest in accuracy is properly taken into account." *Id.* at 1233. The Court of Appeals explained that its holding was "justified and required, even if Commerce is viewed as acting entirely under subsection (a) in determining Mueller's rate." *Id.* The Court of Appeals' use of "even if" is properly read as "assuming, as we do here," given that Commerce indeed acted under the authority of subsection (a) in the administrative proceeding, and the Court undertook no prior analysis of subsection (b) in *Mueller*. Moreover, the Court's phraseology demonstrates the Court's subtle recognition of the importance of its holding—that policy rationales are permissible under subsection (a)—in light of the fact that subsection (b) has traditionally called for policy rationales, such as deterrence. *See, e.g., Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (an AFA rate should be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance")). The Court of Appeals noted that such considerations could be reasonable in Mueller's case, given that Mueller had an existing relationship with its supplier and thus "could potentially have refused to do business" as a tactic to induce cooperation. *Mueller*, 753 F.3d at 1234–35. As for the evasion rationale, the Court of Appeals explained that the uncooperative supplier—itself a mandatory respondent in the administrative proceeding—could potentially evade its own AFA rate by exporting its goods through Mueller if Mueller were assigned a favorable antidumping rate. *Id.* at 1235.

A close reading of section 1677e(b) and *Mueller* reveals that application of an inference adverse to the interests of a cooperating respondent under subsection (b) is not contemplated by the statute nor the Court of Appeals. First, the plain language of section 1677e(b)

[27] The Court of Appeals acknowledged that Commerce justified its determination of Mueller's margin "primarily under subsection (a)." *Mueller*, 753 F.3d at 1232. The Court of Appeals also explained that "Commerce used 'facts otherwise available' to calculate Mueller's margin under 19 U.S.C. § 1677e(a) of the statute." *Id.* at 1230.

expressly limits Commerce's application of an adverse inference to the interests of the party that failed to cooperate. 19 U.S.C. § 1677e(b)(1) (where an interested party fails to cooperate, Commerce "may use an inference that is adverse to the interests of that party"). Second, in the determination giving rise to *Mueller*, Commerce expressly disavowed imposing an adverse inference against a cooperating party:

> The Department has found that the necessary information is absent from the record because [Mueller's uncooperative supplier] failed to cooperate, and has not made a finding that Mueller failed to cooperate. Accordingly, the Department has not applied an adverse inference against the interest of Mueller. Instead, the Department has selected from the facts otherwise available, the best information to use in place of [the uncooperative supplier's] withheld cost data.

Mueller IDM at 16. The Court of Appeals did not reject Commerce's selection of facts available under subsection (a) despite its adverse effect on Mueller. The Court of Appeals' key observation—that subsection (a) "does not provide for the specific facts that should be used as a gap-filling mechanism"—set the stage for Mueller's lasting insight—that policy rationales are not reserved exclusively for the realm of subsection (b). *See Mueller*, 753 F.3d at 1234. "The statute on its face does not preclude Commerce from relying on the same considerations under subsection (a) for an AFA determination as used under subsection (b)."[28] *Id.*

Here, several of Canadian Solar's unaffiliated suppliers of solar modules did not report information on their FOPs, information Com-

[28] After explaining Commerce's authority to act under subsection (a), the Court of Appeals notes that its ruling in *Mueller* is consistent with its precedents applying subsection (b) (which it describes as "properly directed to non-cooperating parties"), referring to those cases as constituting a separate body of law. *See Mueller*, 753 F.3d at 1234 (citing *De Cecco*, 216 F.3d at 1032; *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1379 (Fed. Cir. 2012); *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1370–71 (Fed. Cir. 2014)). The Court of Appeals sought to ensure that developing law under (a) would exist harmoniously with the law under (b), and to preserve the appropriate balance between accurately estimating respondents' antidumping rates, *see Rhone Poulenc, Inc.*, 899 F.2d at 1191 (Fed. Cir. 1990), and relying on policy rationales. *See Mueller*, 753 F.3d at 1233; *see also Changzhou*, 701 F.3d at 1379 (holding that Commerce may not exclusively apply a deterrence rationale in the case of a cooperating party and must conduct a case-specific factual analysis). Indeed, in the case of a cooperating respondent, Commerce may consider policy rationales in making a facts otherwise available determination, but those considerations must reasonably be based in the facts of the case. *See Xiping Opeck Food Co., Ltd. v. United States*, 38 CIT __, __, 34 F. Supp. 3d 1331, 1351 (2014) (holding that, on remand, Commerce must explain the relevance of any inducement or evasion considerations and must address how using AFA to calculate a cooperating party's rate where that rate has no impact on the non-cooperating party is reasonable).

merce needed to calculate Canadian Solar's antidumping rate.[29] Final Decision Memo at 15. Commerce applied "partial AFA" in place of the missing information. Final Decision Memo at 17. First, it noted that section 1677e(a) "provides that the Department shall apply 'facts otherwise available' if an interested party or any other person withholds information that has been requested." *Id.* at 15. Next, Commerce stated that subsection (b) "provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* Thereafter it selected Canadian Solar's highest consumption rates for FOPs for solar cells and modules sold in the United States "because the suppliers in question failed to cooperate by not acting to the best of their abilities to comply with a request for information." *Id.* at 18. In other words, Commerce used an adverse inference invoking 1677e(b) based on the suppliers' lack of cooperation to calculate Canadian Solar's rate.

Commerce's application of an adverse inference under subsection 1677e(b) is contrary to law. The plain meaning of the statute, as confirmed by *Mueller*, does not provide for an adverse inference against a cooperative respondent under subsection 1677e(b). It is undisputed that Canadian Solar cooperated in the administrative review. *See* Canadian Solar's Br. at 10; Def.'s Br. at 34–41; Oral Arg. at 00:14:45–00:15:00 (Defendant agreeing that Canadian Solar was a cooperative respondent); *See also* Unreported [FOPs] Mem. at 5, PD 517, CD 585, bar code 3533043–01 (Dec. 16, 2016) (stating that Commerce may apply AFA in determining a cooperative respondent's dumping margin to induce cooperation of the uncooperative party). As discussed, the statute allows Commerce to select facts available under subsection (a), not apply an adverse inference against a cooperating party under subsection (b). Commerce may consider inducement and evasion rationales in selecting amongst facts available under subsection (a), so long as accuracy remains the predominant concern. *Mueller*, 753 F.3d at 1233. The Court of Appeals in *Mueller* explained that Commerce is not prohibited "from drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party," but that was not the set of facts

[29] The unaffiliated suppliers are interested parties for purposes of the statute. *See* 19 U.S.C. § 1677(9)(A) (defining "interested party" as, *inter alia*, a foreign manufacturer of subject merchandise).

presented.[30] *Id.* at 1236. Generally, Commerce's decision to rely on subsection (a) versus (b) (or vice versa) is critical, as the two subsections involve varying levels of review and trigger separate lines of jurisprudence. *Id.* at 1232 ("[t]hese two subsections have different purposes."), 1234 (discussing the jurisprudence under subsection (b) separately). In the case of a cooperating party, selection of facts available under subsection (a) where Commerce considers an inducement or evasion rationale necessarily involves a more searching review. Commerce must conduct "a case-specific analysis of the applicability of deterrence and similar policies," placing a "greater emphasis on accuracy" where the decision affects a cooperating party. *Id.* at 1234 (citing *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1379 (Fed. Cir. 2012)). Here, Commerce purports to impose "partial AFA" pursuant to section 1677e(b), relying principally on *Mueller*. As explained, *Mueller* addressed a determination Commerce made under subsection (a), and its lessons thus apply to the selection of facts available under subsection (a). Commerce's application of an adverse inference—purportedly under subsection 1677e(b)—is therefore contrary to law.

To the extent Commerce purports to rely on 19 U.S.C. § 1677e(a) for its application of partial AFA, its determination that Canadian Solar could have potentially induced its uncooperative suppliers to cooperate is unsupported by substantial evidence. Commerce cites both subsections 1677e(a) and (b) in its determination, but found, "pursuant to [section 1677e(b)] of the Act, that the application of partial AFA is warranted." Final Decision Memo at 18. The statute makes clear that Commerce must invoke subsection (a) to reach subsection (b). Therefore, Commerce's invocation of subsection (a) would seem to be solely in service of its subsection (b) analysis. Nonetheless, in its determination Commerce discusses and purports to rely upon *Mueller* throughout, *see* Final Decision Memo at 16–17, a case that relies on a subsection (a) analysis. *See Mueller*, 753 F.3d at 1230, 1232. It is therefore possible that Commerce also attempts to rely upon subsection (a) or some combination of subsection (a) and (b). In any event, the record does not support Commerce's determination pursuant to an analysis under subsection (a), as Commerce fails to show that Canadian Solar had the type of long-standing relationships with its suppliers that would give it leverage in the marketplace.

[30] The Court of Appeals referred specifically to the situation where Commerce makes an adverse inference to calculate the rate of a non-cooperating party, and that rate may be used in calculating the rate of a cooperating party. *Mueller*, 753 F.3d at 1236 (citing *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010)). That is not the case here, where Commerce had no reason to calculate a rate for the uncooperative suppliers.

Although the Court of Appeals in *Mueller* does not expound upon what constitutes an "existing relationship," surely more is required than what is present here. 753 F.3d at 1235; *see also Changzhou*, 701 F.3d at 1379 (holding that there was no justification for an AFA rate based in deterrence where the rate would affect only the cooperating party). Here, Commerce based its determination that Canadian Solar has long-term relationships with its suppliers on the fact that it maintains "supplier-specific accounts in the accounting system" and corporate divisions dedicated to the purchasing of solar cells. Final Decision Memo at 16. Such facts do not reasonably indicate the presence of a long-term relationship creating leverage. Indeed, corporate practices such as those listed by Commerce are equally consistent with short-term, unimpactful business relationships falling short of the type that would indicate that one party holds undue influence. Without more evidence showing leverage, Commerce's determination that Canadian Solar could have induced cooperation is unreasonable.[31]

Defendant argues that *Mueller* does not require certainty—but mere potentiality—that the cooperating respondent could induce cooperation, and that Canadian Solar's relationships with its suppliers

[31] Defendant invokes this court's review of Commerce's final determination in the second administrative review ("AR2") of the ADD order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the PRC, as support for the argument that Canadian Solar could have induced its suppliers to cooperate. Def.'s Br. at 36 (quoting *SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 1254, 1277–78 (2017) ("*SolarWorld I*"). *SolarWorld I* is inapposite because (1) it did not involve a challenge that Commerce's application of partial AFA was contrary to law, and (2) the facts were distinguishable from those of the current action. In AR2, Commerce applied partial AFA to value Trina's unreported FOPs from Trina's unaffiliated solar cell suppliers. *See* Decision Mem. for the Final Results of the 2013–2014 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From [the PRC] at 52, A-570–979, (June 13, 2016), *available at* https://enforcement.trade.gov/frn/summary/prc/2016–14532–1.pdf (last visited Apr. 11, 2019) ("AR2 IDM"). Trina argued that Commerce's determination was arbitrary and unsupported by substantial evidence because Commerce did not explain what percentage of a respondent's FOPs must be unreported for Commerce to consider the missing information significant enough to warrant AFA. *SolarWorld I*, 41 CIT at __, 273 F. Supp. 3d at 1276; Mem. Supp. Mot. [Trina] J. Agency R. at 19, Jan. 25, 2017, ECF No. 40 (SolarWorld Americas, Inc. v. United States, Consol. Ct. No. 16–00134). The CIT sustained Commerce's determination, noting that Commerce reasonably explained that the percentage of solar cell inputs provided by Trina's unaffiliated suppliers was significant, and thus could not be excused. *SolarWorld I*, 41 CIT at __, 273 F. Supp. 3d at 1277–78 (quoting AR2 IDM at 52). Trina thus did not challenge Commerce's determination as contrary to law, as Canadian Solar does here. *See* Canadian Solar's Br. at 10. Second, the facts of *SolarWorld I* differed from those of the present action. There, the CIT upheld Commerce's determination that Trina could induce cooperation from its suppliers based on "what Trina acknowledged were long-standing business relationships between Trina and the suppliers." *SolarWorld I*, 41 CIT at __, 273 F. Supp. 3d at 1278 (citing AR2 IDM at 56). Here, by contrast, Canadian Solar disputes that it has long-term relationships with the uncooperative suppliers, and Commerce's determination on this issue is unsupported by substantial evidence, as explained above. Defendant's reliance on this court's decision in *SolarWorld I* is therefore unavailing.

meet the relevant bar.[32] Def.'s Br. at 36 (citing *Mueller*, 753 F.3d at 1235). Defendant asserts that Commerce made three conclusions that demonstrate Canadian Solar's ability to potentially induce cooperation: 1) that "Canadian Solar is a significant producer in the solar market with significant sales in 2014" and that it was one of the largest two exporters of subject merchandise to the United States during the relevant period; 2) that Canadian Solar continues to grow rapidly; and 3) that Canadian Solar "purchased a substantial quantity of solar cells and solar modules from its suppliers." Def.'s Br. at 37–38 (citing Final Decision Memo at 16). Such observations hardly establish that Canadian Solar possessed leverage over its suppliers, particularly under the more searching subsection (a) analysis. *See Mueller*, 753 F.3d at 1235 (explaining that unlike *Changzhou*, Mueller potentially had a mechanism to force the non-cooperating parties to cooperate); *cf. Xiping Opeck Food Co., Ltd. v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1141, 1158–59 (2017) (upholding Commerce's determination that cooperative respondent was in a position to induce cooperation of non-cooperative entity because the non-cooperative entity "was not in a position to evade a dumping margin assigned to [the cooperative respondent] by sourcing from a different supplier," given "the nature of their relationship and . . . [the cooperative respondent's] statement that it dominated and set prevailing prices in the U.S. market"). Further, as Commerce noted, the record contains no information regarding Canadian Solar's share of its uncooperative suppliers' business. Final Decision Memo at 16. Commerce stated that, although the record contained no such information, it could not conclude, "based on the lack of such information, that Canadian Solar's refusal to do business with its uncooperative suppliers would not serves [sic] as a mechanism to induce coopera-

[32] Defendant points out that "Canadian Solar does not aver that it ever threatened to end its business relationship with any of these suppliers." Def.'s Br. at 37. Although the Court of Appeals in *Mueller* contemplated a threat to end business as a mechanism for exercising leverage, the Court did not require it. *See Mueller*, 753 F.3d at 1235. Canadian Solar attempted to induce the cooperation of its suppliers. Indeed, Canadian Solar contacted the suppliers in question repeatedly over a period of up to four months, requesting FOP data from each supplier, in some cases up to eleven times. Canadian Solar's Br. at 10 (citing Canadian Solar's June 8, 2016 Sec. A Suppl. Questionnaire Resp. at Ex. SA-14 & SA-16, PD 263, CD 281–285 (June 8, 2016); Canadian Solar's July 8, 2016 Sec. D Suppl. Questionnaire Resp. at Ex. SD-13, PD 330, CD 358–365 (July 8, 2016); Canadian Solar's Sept. 2, 2016 Suppl. Questionnaire Resp. at Revised Ex. SD2–1, PD 428, CD 518 (Sept. 2, 2016)). Canadian Solar even expressed that cooperation was an "urgent" matter but was unable to persuade the suppliers. *See id.* Moreover, Defendant correctly acknowledges that Commerce did not base its decision on Canadian Solar not threatening its suppliers, but rather on the three conclusions listed below. Def.'s Br. at 37. Canadian Solar's lack of a threat to cease doing business is therefore not dispositive of the issue at hand—its ability to induce cooperation.

tion." *Id.* While Commerce may be able to avoid further inquiry where it acts pursuant to its authority under subsection (b), it cannot point to a lack of evidence to satisfy its obligations under a subsection (a) analysis. Under the more searching "case-specific analysis of the applicability of deterrence and similar policies," Commerce's reasoning here cannot support its determination. Accordingly, Commerce's application of partial AFA in calculating Canadian Solar's antidumping margin is remanded for further explanation or reconsideration.

III. Commerce's Decision to Include Zero Quantity Import Data

In its final determination, Commerce opted to include in the average unit surrogate value calculations import data with quantities of zero, finding "no basis to conclude that the zero quantity import data included in our [surrogate value] calculations are errors or that these zero quantity imports result in unreliable and distortive [surrogate values]." Final Decision Memo at 86. Rather, Commerce found these imports attributable to rounding small import quantities down to zero. Final Decision Memo at 86. Trina argues the record contains no evidence that shipments of low quantities were rounded down to zero, and that including such data is distortive. Trina's Br. at 14–17. Defendant responds that Commerce reasonably determined that the record lacked any basis to conclude that the zero quantity data were the result of errors. Def.'s Br. at 41–42. For the reasons that follow, Commerce's determination is supported by substantial evidence.

Commerce found in its final determination that the zero quantity imports in the data set were attributable to rounding small import quantities down to zero. Final Decision Memo at 86. Commerce addressed Trina's counter argument that if the zeros were attributable to rounding that one would expect a greater number of quantities rounded to one than to zero because quantities from 0.5 units to 1.49 would round to one. Trina's Br. at 16 (citing Trina's Administrative Case Br. at 21–22, PD 531–532, CD 588, bar code 3538943–02 (Jan. 25, 2017)). Commerce found no reason to expect such a neat distribution of data as Trina describes. Trina's argument regarding how the data points should distribute does not detract from Commerce's otherwise reasonable determination that the zero quantity data are the result of rounding. Further, Commerce explained that if the zero quantity entries constituted error, it would expect similar errors to occur with respect to the reported import values, and the record contained no such errors. Final Decision Memo at 86. Additionally, if the entries were error, Commerce reasoned, such errors would suggest serious flaws with the GTA data Commerce utilized, and no party

suggested that such fundamental flaws existed. *Id.* Commerce's explanation is reasonable and its determination is thus sustained. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"); *see also Daewoo Electronics Co., Ltd. v. Int'l Union of Electronic Elec., Tech, Solaried, & Mach. Workers*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (explaining that the inquiry is whether the record reasonably supports an agency's decision, not whether some other reasonable inference exists).

IV. Calculation of TUS's U.S. Indirect Selling Expense Ratio

In calculating Trina's constructed export price, Commerce declined to use debt restructuring income reported by Trina to offset Trina's indirect selling expenses. Final Decision Memo at 84. Trina challenges this decision as unsupported by substantial evidence and arbitrary. Trina's Br. at 18. Trina also argues that Commerce failed to alert Trina to its concerns about the claimed debt restructuring income during the administrative proceeding. *Id.* at 19. Defendant responds that Commerce reasonably determined not to offset Trina's indirect selling expense by the claimed debt restructuring income. Def.'s Br. at 43–44.

The antidumping statute requires Commerce to make certain adjustments to a respondent's reported constructed export price. *See* 19 U.S.C. § 1677a(c)–(d). One of the adjustments made to constructed export price is to deduct indirect selling expenses. *See* Final Decision Memo at 83–84; *see also* 19 U.S.C. § 1677a(d)(1)(D). Indirect selling expenses are those costs that "would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such sales," while direct selling expenses are expenses that "bear a direct relationship to" the particular sales in question. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 823–4 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4164. It is Commerce's practice to allow income gained through debt restructuring to be used to offset indirect selling expenses (thus minimizing the reduction in constructed export price). Final Decision Memo at 84.

Commerce reasonably declined to offset Trina's indirect selling expense by the claimed debt restructuring income because there was insufficient information available on the record for Commerce to determine what portion of the gain was attributable to the period of review. Final Decision Memo at 84–85. Commerce's stated practice is to only allow such an offset for gain attributable to the period of

review. *Id.* (citing Issues and Decision Mem. for the Final Determination in the [ADD] Investigation of Structural Steel Beams from South Korea at Comment 26, A-580–841, (July 5, 2000) *available at* https://enforcement.trade.gov/frn/summary/korea-south/00–16952–1.txt (last visited Apr. 11, 2019); Issues and Decision Mem. for the Final Determination in the [ADD] Investigation of Light-Walled Rectangular Pipe and Tube from Mexico at 69–70, A–201–832, (Aug. 26, 2004) *available at* https://enforcement.trade.gov/frn/summary/mexico/E4–2045–1.pdf (last visited Apr. 11, 2019)). Trina's claim for debt restructuring income is based solely on a single line item in its 2015 income statement. *See* Trina's Sec. C Questionnaire Resp. at Ex. C-10, PR 232–34, CD 188–205, bar code 3468547–01 (May 12, 2016) ("Trina's Sec. C Questionnaire Resp."). Trina complains that Commerce made no further inquiry regarding whether "income might not relate entirely to the current period" and therefore argues that Commerce's determination is purely speculative. Trina's Br. at 19. However, "Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record." *ABB Inc. v. United States*, 42 CIT __, at __, 355 F. Supp. 3d 1206 at 1222 (2018) (citing *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir. 2016); *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Trina did not provide an explanation of the debt restructuring agreement, evidence of its terms, or information as to the maturity of the related loan or loans, that would have allowed Commerce to determine whether the income recorded in 2015 was related entirely to that year or to a number of years. *See* Final Decision Memo at 85. Trina's argument accordingly fails as Commerce's determination was not speculative but rather reasonable and based on substantial evidence.[33]

V. Commerce's Rejection of Qixin's Separate Rate Application

In this administrative review, Qixin was not selected as a mandatory respondent. On March 10, 2016, Qixin submitted a separate rate

[33] Trina further argues that it was arbitrary of Commerce to acknowledge that debt restructuring income can be used to offset indirect selling expenses, but then to disallow the offset in the entirety. Trina's Br. at 18. This argument fails for the same reason that Commerce's determination is supported by substantial evidence. Commerce acknowledged that Trina's debt restructuring income could potentially be used to offset its indirect selling expenses. Final Decision Memo at 85. However, Commerce did not have sufficient record evidence to determine what portion, if any, of the recorded income from debt restructuring related to the period of review. *Id.*; *see also* Trina's Sec. C Questionnaire Resp. at Ex. C-10. It is not inconsistent or arbitrary of Commerce to recognize it would make an offset for debt restructuring income, but to decline to do so where there is insufficient evidence to determine that deduction in a particular instance.

application. *See* Qixin's Separate Rate Application, PD 107–109, bar code 3447985 (Mar. 10, 2016). Commerce issued a first and second supplemental questionnaire to Qixin, *see* First Suppl. Questionnaire to Qixin, PD 300, bar code 3481536–01 (June 24, 2016); Second Suppl. Questionnaire to Qixin, PD 474, bar code 3521534 (Nov. 10, 2016), to which Qixin timely submitted responses. *See* Qixin's First Suppl. Questionnaire Resp., PD 332, CD 392, bar code 3486020–01 (July 12, 2016); Qixin's Second Suppl. Questionnaire Resp., PD 481, CD 553, bar code 3523945–01 (Nov. 21, 2016). Commerce issued the *Preliminary Results* on December 16, 2016, which did not mention Qixin. *See Preliminary Results*. Qixin filed an administrative brief on January 25, 2017 challenging the *Preliminary Results* and requesting an explanation for Commerce's omission of Qixin from the *Preliminary Results*. *See* Qixin Administrative Case Brief, PD 536, bar code 3538956–01 (Jan. 25, 2017). Commerce did not respond to Qixin's request for an explanation, and on June 20, 2017, Commerce published the *Final Results*, in which Commerce explained that Qixin's separate rate application had been rejected. *See* Final Decision Memo at 90–92.

Commerce acknowledged that it "inadvertently omitted a discussion of [Qixin's] separate rate status from the *Preliminary Results*," but reasoned that Qixin "became aware of the issue through the Department's supplemental questionnaires." Final Decision Memo at 91. Commerce further explained that the fact that it did not mention Qixin in the *Preliminary Results* should have served as an indicator to Qixin that its application had been rejected. *Id.* Qixin now argues that Commerce erred in not mentioning Qixin in the *Preliminary Results*, and that Commerce must provide reasonable notice of a decision and the reasons behind that decision to enable the party to effectively take part in the administrative process. Qixin's Br. at 8–9 (quoting *NEC Corp. v. United States*, 151 F.3d 1361, 1374 (Fed. Cir. 1998)).

Defendant now acknowledges that Qixin had no opportunity to respond to Commerce's denial of its separate rate application and, likewise, Commerce lacked the opportunity to respond to the arguments Qixin may have made, had it had the opportunity. Def.'s Br. at 44–45. Defendant accordingly requests that the court remand the issue to Commerce for reconsideration. *Id.*

The court has discretion in deciding whether to grant a request for remand. *See SFK USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). By failing to include Qixin in the *Preliminary Results*, Commerce deprived Qixin of the opportunity to respond substantively to the Department's position, and thus Qixin did not have an ad-

equate opportunity to participate in the administrative process. The court therefore remands the issue to Commerce to reconsider Qixin's separate rate application.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's surrogate value selections for valuing respondents' aluminum frames, nitrogen, polysilicon ingots and blocks, and financial ratios are sustained; and it is further

ORDERED that Commerce's decision to include import data with reported quantities of zero in the surrogate value calculations is sustained; and it is further

ORDERED that Commerce's decision to deny an offset for Trina U.S.'s debt restructuring income is sustained; and it is further

ORDERED that Commerce's surrogate value selection for valuing respondents' module glass is remanded to the agency for reconsideration or further explanation; and it is further

ORDERED that Commerce's application of an adverse inference in calculating Canadian Solar's dumping rate is remanded to the agency for reconsideration; and it is further

ORDERED that Commerce's decision to reject Qixin's separate rate application is remanded to the agency for reconsideration; and it is further

ORDERED that Commerce shall file its remand determination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that the parties shall have 30 days thereafter to file a reply to comments on the remand determination.

Dated: April 16, 2019
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 19–48

ARISTOCRAFT OF AMERICA, LLC, Plaintiffs, v. UNITED STATES, Defendant.

PUBLIC VERSION

Before: Leo M. Gordon, Judge
Consol. Court No. 15–00307

[Commerce's *Second Remand Results* sustained.]

Dated: April 17, 2019

Jonathan M. Freed, Trade Pacific PLLC of Washington, DC for Consolidated Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd.

(USA), Best For Less Dry Cleaners Supply LLC, Ideal Chemical & Supply Company, Laundry & Cleaners Supply Inc., Rocky Mountain Hanger MFG Co., Rosenberg Supply Co., Ltd., and ZTN Management Company, LLC.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, and *Reginald T. Blades*, Assistant Director. Of counsel was *Jessica DiPietro*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

OPINION

Gordon, Judge:

This action involves the sixth administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering steel wire garment hangers from the People's Republic of China ("PRC"). *See Steel Wire Garment Hangers from the PRC*, 80 Fed. Reg. 69,942 (Dep't of Commerce Nov. 12, 2015) (final results admin. rev.) ("*Final Results*"); *see also* Issues & Decision Memorandum for Steel Wire Garment Hangers from the PRC, A–570–918 (Dep't of Commerce Mar. 6, 2015), *available at* http://enforcement.trade.gov/frn/2015/1511frn/2015–28757.txt (last visited this date) ("*Decision Memorandum*").

Before the court is Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Second Remand Results*"), ECF No. 87–1,[1] filed pursuant to the court's remand order in *Aristocraft of America, LLC v. United States*, 42 CIT ___, 331 F. Supp. 3d 1372 (2018) ("*Aristocraft II*"). Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), Best For Less Dry Cleaners Supply LLC, Ideal Chemical & Supply Company, Laundry & Cleaners Supply Inc., Rocky Mountain Hanger Mfg. Co., Rosenberg Supply Co., Ltd., and ZTN Management Company, LLC (collectively, "Plaintiffs") challenge Commerce's calculation of irrecoverable value-added tax ("VAT") based on the application of the standard VAT levy to the free on board (FOB) export value of finished wire hangers. *See* Pls.' Cmts. on Final Results of Redetermination Pursuant to Court Remand, ECF No. 92 ("Pls.' Cmts."); *see also* Def.'s Response to Pls.' Cmts. on Commerce's Remand Results, ECF No. 97 ("Def.'s Resp."). Familiarity with the court's decisions in *Aristocraft II*, and *Aristocraft of America, LLC v. United States*, 41 CIT ___, 269 F. Supp. 3d 1316 (2017), is presumed. The court has jurisdiction pursuant to

[1] All citations to the remand results, the agency record, and the parties' briefs are to their confidential versions unless otherwise noted.

Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the court sustains Commerce's *Second Remand Results*.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A West's Fed. Forms, National Courts § 3.6 (5th ed. 2018).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the Tariff Act. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."); *see generally* Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* 273–280 (3d ed. 2018).

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

II. Discussion

Value Added Tax

Plaintiffs argue that Commerce's *Second Remand Results* are unreasonable (unsupported by substantial evidence) and cannot be sustained. Based on the following, the court is not persuaded that Plaintiffs establish that Commerce's eight percent irrecoverable VAT adjustment to Shanghai Wells' export price ("EP") and constructed export price ("CEP") is unreasonable.

Aristocraft II highlighted the court's concerns with certain aspects of how Commerce calculated the irrecoverable VAT adjustment to Shanghai Wells' EP and CEP without reference to the amount of input VAT paid. The court noted that it had "doubts about the overall reasonableness of Commerce's calculation of irrecoverable VAT" due to Commerce's failure to reconcile the relevance of the admitted "link between the input VAT paid and [the aggregate] tax paid or refunded." *Aristocraft II*, 42 CIT at ___, 331 F. Supp. 3d at 1378.

When the court reviewed Commerce's policy for adjusting for irrecoverable VAT, it appeared that Commerce's straightforward irrecoverable VAT adjustment of eight percent may have oversimplified a calculation that involved various aspects of Shanghai Wells' tax liability under China's VAT scheme. *Id*. For instance, Commerce noted that the record indicates that [[

]]. *See Second Remand Results* at 12–13. Without accounting for Shanghai Wells' input VAT paid, the court was concerned that, in those circumstances, Commerce's irrecoverable VAT adjustment would risk overestimating the impact of the irrecoverable VAT offset on Shanghai Wells' overall VAT liability (and thus, result in an over-adjustment to the EP and CEP of subject merchandise). *See Aristocraft II*, 42 CIT at ___, 331 F. Supp. 3d at 1378 (noting the court's uncertainty as to the "overall reasonableness of Commerce's calculation of irrecoverable VAT" given Commerce's refusal to consider input VAT paid). On remand, Commerce addressed these concerns, explaining how the Chinese VAT regulations direct the calculation of an amount of irrecoverable VAT that is to be added to the price of the subject merchandise exports, without reference to the exporter's input VAT paid. *See Second Remand Results* at 6–14. Commerce further explained in the *Second Remand Results* that it did not need to account for input VAT paid in calculating an accurate irrecoverable VAT adjustment because:

> on a POR-wide basis, Shanghai Wells' total input VAT credit, [[ ]], was [[ ]] by its total irrecoverable VAT liability, [[ ]], and the amount

> [[ ]]
> would be carried forward to continue to affect the offsetting of its output VAT in future periods. This relationship underscores another reason why the input VAT paid by Shanghai Wells is not relevant to the irrecoverable VAT *calculation* during the POR; not only is irrecoverable VAT calculated on a different basis than input VAT, but the effect of the irrecoverable VAT expense is not tied to input VAT paid in any particular month. Thus, to the extent that Commerce may not be able to link the input VAT to the deduction for irrecoverable VAT on any given record, the input VAT paid is not relevant to the calculation of irrecoverable VAT, which is based in Chinese law. In addition, the amount of irrecoverable VAT is not dependent on either the amount of output VAT or the amount of net VAT liability.

Second Remand Results at 13. Contrary to Plaintiffs' argument, Commerce directly responded to the court's request for additional detail as to how and why Commerce was applying its irrecoverable VAT policy generally, as well as how its eight percent irrecoverable VAT adjustment was supported by the record.

Plaintiffs ignore the Chinese laws cited by Commerce as the basis for the irrecoverable VAT adjustment and calculations, focusing instead solely on Commerce's refusal to consider the relevance of Shanghai Wells' input VAT or its overall VAT liability. *See generally* Pls.' Cmts. Plaintiffs correctly state that "[t]he fact of the matter is that Shanghai Wells only pays the Chinese government the 'net' VAT amount, which is the result of offset between output VAT and input VAT." Pls.' Cmts. at 3. However, in the *Second Remand Results*, Commerce explained how Shanghai Wells' "net" VAT liability is directly increased due to irrecoverable VAT. *See Second Remand Results* at 4. Irrecoverable VAT, as calculated and adjusted for by Commerce, reduces the amount of the input VAT offset that Shanghai Wells may use to reduce its overall VAT liability. Commerce reasonably found that subject merchandise EP and CEP must be directly reduced by the irrecoverable VAT because irrecoverable VAT, as set forth in Chinese law, reduces the input VAT offset that serves to limit Shanghai Wells' overall VAT liability. *Id.*

Alternatively, Plaintiffs contend that Commerce's explanation for its irrecoverable VAT adjustment demonstrates that irrecoverable VAT is not "included in the price" and is thus "not permitted by the statute." Pls.' Cmts. at 2. Plaintiffs' challenges to Commerce's irrecoverable VAT adjustment, however, are undercut by the record. Plaintiffs highlight that Shanghai Wells' "Sales Trace" exhibit in its Section A Questionnaire response did not specifically identify the inclusion of

irrecoverable VAT in the export price of the subject merchandise, and argues therefore that Commerce could not reasonably conclude that irrecoverable VAT was "included in [the] price" of the subject merchandise. *Id*.

Commerce, however, identifies various instances in Shanghai Wells' own VAT documentation and financial records where Shanghai Wells appears to recognize irrecoverable VAT as a distinct cost that is included in its cost of sales (and is thus "included in such price" of export sales of subject merchandise). *See Second Remand Results* at 18–19. The record presented Commerce with limited information from which Commerce was required to make an inference of whether irrecoverable VAT was or was not "included in such price" of Shanghai Wells' export sales of subject merchandise. Plaintiffs have failed to demonstrate Commerce had "one, and only one, reasonable conclusion" to be drawn from the whole of the record—that Shanghai Wells' irrecoverable VAT was not included in its export price of subject merchandise. *See, e.g.*, *Tianjin Wanhua Co. v. United States*, 40 CIT ___, ___ 179 F. Supp. 3d 1062, 1071 (2016); *US Magnesium LLC v. United States*, 39 CIT ___, ___, 70 F. Supp. 3d 1321, 1325 (2015).

Accordingly, Commerce's *Second Remand Results* address the court's concerns raised in *Aristocraft II*, and provide a reasoned explanation supported by substantial evidence for Commerce's irrecoverable VAT adjustment of eight percent to Shanghai Wells' EP and CEP for subject merchandise.

III. Conclusion

For the foregoing reasons, the *Second Remand Results* are sustained. Judgment will enter accordingly.

Dated: April 17, 2019
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 19–50

XIPING OPECK FOOD CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 17–00260

[U.S. Department of Commerce's final results are sustained.]

Dated: April 26, 2019

Yingchao Xiao, Lee & Xiao, of San Marino, California, argued for Plaintiff.

Mollie L. Finnan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Brendan Saslow*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION

Eaton, Judge:

Plaintiff Xiping Opeck Food Co., Ltd. ("Plaintiff" or "Xiping") moves for judgment on the agency record, pursuant to 19 U.S.C. § 1516a (2012), challenging the United States Department of Commerce's ("Commerce" or the "Department") final results of its administrative review of the antidumping duty order covering freshwater crawfish tail meat from China. *See Freshwater Crawfish Tail Meat From the People's Rep. of China*, 82 Fed. Reg. 47,469 (Dep't Commerce Oct. 12, 2017) ("Final Results"), and accompanying Issues and Dec. Mem. (Oct. 5, 2017), P.R. 142 ("Final IDM"). The period of review ("POR") was September 1, 2015 through August 31, 2016.

Xiping, an exporter of crawfish tail meat from China,[1] objects to Commerce's rejection of untimely filed surrogate country financial statements from Thailand. Plaintiff also contends that the South African financial statements, on which Commerce relied, were "insufficiently disaggregated," and, therefore, could not serve as a proper basis for a normal value calculation. *See* Pl.'s Br. Supp. Mot. J. Agency R., ECF No. 24 ("Pl.'s Br.") 1; Pl.'s Reply Br., ECF No. 28.

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012). Because Commerce did not abuse its discretion by rejecting the untimely filed financial statements, and Plaintiff failed to exhaust its administrative remedies when disputing the use of the South African financial statements. Commerce's Final Results are sustained.

BACKGROUND

In September 1997, Commerce issued its antidumping duty order on freshwater crawfish tail meat from China. *See Freshwater Crawfish Tail Meat From the People's Rep. of China*, 62 Fed. Reg. 41,347

[1] At the preliminary results stage of the 2015–2016 review, Commerce determined that Xiping, a non-mandatory respondent, had successfully established its eligibility for a separate rate. *See Freshwater Crawfish Tail Meat From the People's Rep. of China*, 82 Fed. Reg. 26,435, 26,436 (Dep't Commerce June 7, 2017). Xiping, however, "was not selected for individual examination" in the 2015–2016 administrative review. *See* Final Results, 82 Fed. Reg. at 47,470.

(Dep't Commerce Aug. 1, 1997), *amended by Freshwater Crawfish Tail Meat From the People's Rep. of China*, 62 Fed. Reg. 48,218 (Dep't Commerce Sept. 15, 1997). On September 8, 2016, the Department published a notice of opportunity to request an administrative review of the order for the POR. *See Opportunity To Request Admin. Rev.*, 81 Fed. Reg. 62,096 (Dep't Commerce Sept. 8, 2016).

Petitioner, Crawfish Processors Alliance (the "Alliance"), responded to the notice and asked Commerce to review, among others, Hubei Nature Agriculture Co., Ltd. ("Hubei"), Yancheng Hi-King Agriculture Developing Co., Ltd. ("Yancheng Hi-King"), and Xiping, all Chinese producers or exporters of crawfish tail meat. *See* Req. Admin. Rev. (Sept. 30, 2016), P.R. 3 ("Alliance Req.") at 1–2. Hubei, having sold subject merchandise from China to the United States during the POR, asked for a review of its dumping margin. *See* Req. Admin. Rev. (Sept. 29, 2016), P.R. 2 at 2 ("Hubei Req.") at 2.

On November 9, 2016, Commerce initiated its review of eleven exporters and producers. *See Initiation of Antidumping and Countervailing Duty Admin. Rev.*, 81 Fed. Reg. 78,778 (Dep't Commerce Nov. 9, 2016); Alliance Req. at 1. The Department subsequently selected Yancheng Hi-King and Hubei as mandatory respondents for individual examination because they had "the largest volume of exports of subject merchandise during the POR." Respondent Selection 2015–2016 Antidumping Duty Admin. Rev. (Dec. 8, 2016), P.R. 31 ("Resp. Selection Mem.") at 5.

On November 29, 2016, Commerce provided interested parties the opportunity to comment on the surrogate country list, the selection of a surrogate country, and the selection of surrogate values. *See* Req. Surrogate County & Surrogate Value Comments & Info. (Nov. 29, 2016), P.R. 20 at 1 ("Req. Surr. Country Info."); Selection Surrogate Countries (Dec. 6, 2016), P.R. 24 (identifying Brazil, Mexico, Romania, Bulgaria, South Africa, and Thailand as potential surrogate countries with economic development similar to that of China). Hubei and the Alliance submitted comments concerning the selection of a surrogate country on March 3, 2017. *See* Surrogate Country Selection Comments (Mar. 3, 2017), P.R. 90 ("Hubei Comments"); Surrogate Country Selection Comments (Mar. 3, 2017), P.R. 91 ("Alliance Comments"). Hubei asked the Department to select "Thailand as the primary surrogate country for the factors of production and Spain for the import data for the valuation of live crawfish." Hubei Comments at 2. The Alliance, however, contested the suitability of Thailand as the primary surrogate, and urged the Department to choose "South Africa as the primary surrogate for values other than whole crawfish and scrap." Alliance Comments at 4.

Although an interested party within the meaning of the statute, Xiping placed no information on the record and filed no comments. *See* 19 C.F.R. §§ 351.102(b)(29), 351.301(a) (2016); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) ("Non-mandatory respondents also have the option of voluntarily completing the antidumping questionnaire to seek individual investigation."). On March 17, 2017, Hubei and the Alliance timely placed surrogate value information on the record, reflecting their respective positions as to the most appropriate surrogate country. *See* Surrogate Values (Mar. 17, 2017), P.R. 96 ("Alliance Surr. Values"); Hubei Surrogate Values Submissions (Mar. 17, 2017), P.R. 98 ("Hubei Surr. Values"). The Alliance's record submissions covered whole crawfish; shell and scrap; overhead, SG&A,[2] and profit; and electricity, and included financial statements from the South African seafood processor Oceana Group (the "Oceana Report"). *See* Alliance Surr. Values Ex. 1–4. Hubei, in turn, submitted information from Thailand relating to imports[3]; labor statistics; brokerage and handling charges; inland freight charges; and water and electricity tariffs. *See* Hubei Surr. Values Ex. 1–5. Hubei did not, however, include any financial statements in its submissions.

On June 7, 2017, Commerce published the preliminary results of its administrative review, with accompanying preliminary decision memorandum. *See Freshwater Crawfish Tail Meat From the People's Rep. of China*, 82 Fed. Reg. 26,435, 26,438 (Dep't Commerce June 7, 2017) ("Preliminary Results"); *see also* Prelim. Dec. Mem. (June 1, 2017), P.R. 123. In the Preliminary Results, Commerce selected Thailand as the primary surrogate country, but relied on financial statements from the South African seafood processing company Oceana Group (the "Oceana Report") to calculate surrogate financial ratios. Prelim. Dec. Mem. at 6. Additionally, Commerce used Spanish data to value whole crawfish input. Prelim. Dec. Mem. at 7.

In the Preliminary Results, Commerce calculated a rate for Hubei of 5.10 percent. *See* Preliminary Results, 82 Fed. Reg. at 26,437. On July 14, 2017, Hubei filed a case brief asking Commerce to either reopen the administrative record to permit the submission of Thai

[2] "SG&A" stands for selling, general and administrative Expenses. *See* 19 U.S.C. § 1677b(b)(3)(B).

[3] Hubei also submitted import data from Brazil, Bulgaria, Mexico, Romania, and South Africa, but urged the Department to rely on Thai data regardless. *See* Hubei Surr. Values at 2 ("[W]e have also included the [Global Trade Atlas] import data from Brazil, Bulgaria, Mexico, Romania, and South Africa for the POR, as well as the prior 5 years of data, and the calculation of proposed surrogate values for the inputs set forth above. To the extent that no import [data] is available from Thailand . . . , the Department should rely upon import data from Thailand from an earlier period or imports from another potential surrogate country.").

financial statements for consideration in the Final Results, or that Commerce place such information on the record on its own initiative. *See* Hubei Admin. Case Br. (July 14, 2017), P.R. 139 ("Hubei Br.") at 8; *see also* Compl., ECF No. 11, ¶ 10. In response, the Alliance filed a rebuttal brief. *See* Alliance Rebuttal Br. (July 19, 2017), P.R. 140 at ii ("The Department should reject Hubei Nature's request to reopen the record to permit the inclusion of additional Thai financial statements for the calculation of surrogate financial ratios. Hubei Nature had a full and fair opportunity to submit such information prior to the applicable deadline but did not do so.").

In the Final Results, issued on October 12, 2017, and in the accompanying Final IDM, Commerce "recalculated a dumping margin of 3.81 percent to Hubei Nature, and assigned the same to Plaintiff," as a result of revising its "calculation of the surrogate value for non-refrigerated inland freight expenses." Compl. ¶ 11; Final Results, 82 Fed. Reg. at 47,470. Commerce refused, however, to accept Hubei's Thai financial statements, and declined to place further information on the record itself, citing the untimeliness of the potential submissions. *See* Final IDM at p. 12 of 13[4] ("In accordance with the statute, the Department's regulations and . . . practice, the Department provided interested parties sufficient time to place surrogate financial information on the record so that interested parties would have a full and fair opportunity to evaluate them and to submit comments and other data in rebuttal."). Therefore, Commerce's Final Results used Thailand as the primary surrogate country, and relied on the South African Oceana Report to calculate surrogate financial ratios.[5] *See* Final IDM at p. 12 of 13; Surrogate Value Mem. (June 1, 2017), P.R. 125 at 3, 5.

On October 31, 2017, Plaintiff filed a Rule 56.2 motion for judgment on the agency record in this Court, challenging Commerce's rejection of Hubei's request to reopen the record. *See* Pl.'s Br. 1. It is worth noting that Plaintiff makes this claim even though no party timely requested an extension of the original deadlines.[6] In its complaint, Plaintiff alleged that "[t]he Department's dumping margin calculation using Oceana Group's financial statement is arbitrary and capricious, and is an abuse of discretion under 19 C.F.R. § 351.302(b)." Compl. ¶ 13. Defendant responded to Plaintiff's motion, maintaining that Commerce's Final Results should be sustained, and Plaintiff's

[4] Because Commerce did not number the pages of the Final IDM, the actual page-count is indicated for ease of reading.

[5] Commerce also continued to rely on the Spanish data for whole crawfish, but the parties do not take issue with this. Final IDM at p. 3 of 13; Surrogate Value Mem. at 3.

[6] 19 C.F.R. § 351.302(b) gives Commerce discretion to extend time limits "for good cause."

motion for judgment on the agency record should be denied. *See* Def.'s Resp. Pl.'s Mot. J. Agency R., ECF No. 25 ("Def.'s Br.").

STANDARD OF REVIEW

Commerce's antidumping duty determinations, findings, or conclusions must be supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

Commerce's decision whether to reject an untimely filed submission is reviewed for abuse of discretion. *See Grobest & I–Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 123, 815 F. Supp. 2d 1342, 1365 (2012) ("[T]he court will review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality."); *see also Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) (discussing application of abuse of discretion standard in *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995)).

LEGAL FRAMEWORK

Commerce is charged with determining if goods are being sold, or are likely to be sold, in the United States at less than fair value. This determination is based on a comparison of normal value and export price. 19 U.S.C. § 1673. The dumping margin for the subject merchandise is reached by finding the amount by which normal value (home market price) exceeds export price (U.S. price). 19 U.S.C. § 1677(35)(A). This margin is then used to determine an antidumping duty rate.

When the merchandise in question is exported from a nonmarket economy country,[7] such as China, Commerce calculates the normal value of the subject merchandise based on the values of the factors of production, adding an "amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1)(B). Additionally, Commerce uses "financial ratios derived from financial statements of producers of comparable merchandise in [a] surrogate country" to calculate the value of additional expenses and profit. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618

[7] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, because the subject merchandise comes from the PRC, Commerce constructed normal value by valuing the factors of production using surrogate data from India. *See* 19 U.S.C. § 1677b(c)(4).

F.3d 1316, 1319–20 (Fed. Cir. 2010) (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010)).

The statute directs Commerce to use the "best available information" to calculate normal value. 19 U.S.C. § 1677b(c)(1)(B). While the term "best available information" is not defined by the statute, "Commerce's discretion . . . is limited by the statute's objective of 'obtain-[ing] the most accurate dumping margins possible.'" *Calgon Carbon Corp. v. United States*, 40 CIT __, __, 145 F. Supp. 3d 1312, 1323 (2016) (quoting *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1191, Slip Op. 04–88, (July 19, 2004) (not reported in Federal Supplement). Therefore, "Commerce's choice of the best available information 'must evidence a rational and reasonable relationship to the factor of production it represents' to be supported by substantial evidence." *Id.* Where, as here, values from a surrogate market economy are used, Commerce, "to the extent possible . . . [looks to] one or more market economy countries that are [1] at a level of economic development comparable to that of the nonmarket economy country, and [2] significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). By its regulations, Commerce has expressed a preference to base its factors of production values, including surrogate financial ratios, on information from one primary surrogate country. 19 C.F.R. § 351.408(c)(2); *see Dorbest*, 604 F.3d at 1368. Thus, Commerce will normally use secondary surrogate country information if information "from the primary surrogate country [is] unavailable or unreliable." *Jiaxing Brother Fastener Co. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1326, 1332–33 (2014), *aff'd,* 822 F.3d 1289 (Fed. Cir. 2016).

DISCUSSION

I. Commerce Did Not Abuse Its Discretion When It Refused to Permit the Untimely Submission of the Thai Financial Statements.

Prior to issuing the Preliminary Results on June 7, 2017, Commerce collected surrogate value information for valuing factors of production and calculating normal value. Commerce set a deadline of March 17, 2017 for the submission of information relating to factors of production. *See* Req. Surr. Country Info. at 2. The regulatory deadline for surrogate value information used in calculating normal value was "no later than 30 days before the scheduled date of the preliminary results," in accordance with 19 C.F.R. § 351.301. Req. Surr. Country Info. at 2; *see* 19 C.F.R. § 351.301(c)(3)(ii). As noted, as a non-mandatory respondent, Plaintiff was not required to place

anything on the record, though it could have so chosen. *See Yangzhou*, 716 F.3d at 1373 ("Non-mandatory respondents also have the option of voluntarily completing the antidumping questionnaire to seek individual investigation."). Nonetheless, Plaintiff, as an interested party, was given notice of the opportunity to submit information, and was on record notice of Hubei's submissions. *See* Req. Surr. Country Info.; Selection Surr. Countries; Hubei Comments. Plaintiff concedes that neither it nor Hubei submitted surrogate financial ratios from Thailand by these deadlines. Pl.'s Br. 3 ("At the time[,] no financial statements from Thai seafood processing companies were present on the record."). The Preliminary Results were published on June 7, 2017. *See* Preliminary Results, 82 Fed. Reg. at 26,435. On July 14, 2017, Hubei asked Commerce to reopen the record. *See* Hubei Br. 8.

Plaintiff contends that Commerce should have exercised its discretion to allow Hubei to place the Thai financial statements on the record, or, in the alternative, that Commerce should have placed Thai data on the record itself. *See* Pl.'s Br. 9 ("Commerce has discretion to accept factual information to value factors of production filed anytime."). In support of this argument, Plaintiff relies primarily on the *Grobest* case as persuasive authority. In *Grobest*, the Court determined that Commerce abused its discretion when it refused to permit a party to submit additional information after the deadline for such submissions had passed. *Grobest*, 36 CIT at 125, 815 F. Supp. 2d at 1367 ("[T]he court holds that in this case, the interests in fairness and accuracy outweigh the burden upon Commerce; therefore, Commerce's rejection of [the consolidated plaintiff's] late-filed submission was an abuse of discretion.").

Plaintiff argues that, although Hubei submitted the Thai financial statements after the submission deadline had passed, the superiority of the Thai data compelled Commerce to accept it. Pl.'s Br. 7–8, 11–12. Plaintiff's reliance on *Grobest* to make its case is misplaced, however, because there, the untimely information was submitted "more than seven months before Commerce released the preliminary results and one year before Commerce released the final result." *Grobest*, 36 CIT at 125, 815 F. Supp. 2d at 1367 (citation omitted). The long periods of time present in *Grobest* led the Court to conclude that "there [was] no concern with finality." *Id.* In this case, however, Hubei asked to submit the Thai financial statements more than a month *after* Commerce released the Preliminary Results. *See* Hubei Br. 8–9. Further, Xiping's claim is a little puzzling since it timely submitted no information for the record, despite being on notice of an opportunity to do

so, and it did not ask for an extension of the deadline. *See* Req. Surr. Country Info. at 2; 19 C.F.R. § 351.301(c)(3)(ii) (setting forth the relevant deadlines).

Plaintiff also emphasizes Commerce's preference for valuing factors of production using information from one surrogate country as a reason it should succeed. Pl.'s Br. 10 ("Commerce has a strong preference to value all [factors of production] in a single surrogate country."). For Plaintiff, this preference should override Commerce's concerns of timeliness. While it is true that Commerce "normally will value all factors in a single surrogate country," including surrogate financial ratios, Commerce is not bound by this preference when the information needed is "unavailable or unreliable." 19 C.F.R. § 351.408(c)(2); *Jiaxing Brother Fastener*, 11 F. Supp. 3d at 1333. Here, the Thai financials were simply not available because they were not on the record, even though Plaintiff and Hubei knew of their availability at least as early as March 3, 2017. *See* Hubei Comments at 3. That is, Hubei noted the existence of the Thai financials in its March 3, 2017 comments, which were placed on the record two weeks prior to the initial deadline of March 17, 2017, and more than three months prior to the Preliminary Results issued on June 7, 2017. *See* Hubei Comments at 3 ("[C]ontemporaneous and publically [sic] available financial statements for producers of comparable merchandise from Thailand are available to value the financial ratios for use in this proceeding segment."). These comments demonstrate that, had Hubei wished to place the Thai financials on the record prior to the deadline, it could have.

As for Xiping's argument that Commerce should have placed the information on the record itself, Commerce is not required to correct a party's omissions. "Commerce has authority to place documents in the . . . record that it deems relevant, [but] 'the burden of creating an adequate record lies with [interested parties] and not with Commerce.'" *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citation omitted) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)). The Federal Circuit has also noted that a party who, as here, is responsible for the lack of timely submitted information, puts itself in an "awkward position" by arguing "that Commerce abused its discretion by not relying on evidence that [the party] itself failed to introduce into the record." *Id.* Here, there were usable financials on the record, and Hubei's observation that there were Thai financials "available to value the financial ratios" does not provide a sufficient reason for Commence to search out the information and place it on the record.

A party may request deadline extensions for good cause, but must submit such requests prior to the original deadline unless the party demonstrates extraordinary circumstances. *See* 19 C.F.R. § 351.302(b)-(c); *see also Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1351 (Fed. Cir. 2015) ("Here, Commerce properly exercised its discretion in rejecting Dongtai Peak's extension requests and Supplemental Responses because (1) the extension requests were submitted after the established deadline in violation of 19 C.F.R. § 351.302(c), and (2) Appellant failed to show 'good cause' for an extension as required by § 351.302(b)."). Commerce notes that neither Plaintiff nor Hubei asked for an extension or tried to demonstrate good cause for the delay in filing the Thai financial statements. *See* Def.'s Br. 11.

As noted, Hubei's Surrogate Country Comments, submitted on March 3, 2017, indicated that Thai financial statements were available to it at least two weeks prior to the initial deadline of March 17, 2017, and more than three months prior to the Preliminary Results. *See* Hubei Comments at 3. Nonetheless, neither Hubei nor Xiping made any attempt to place the Thai financials on the record until more than a month after the Preliminary Determination had been issued. Thus, here, unlike *Grobest*, Commerce was well on its way to making the Final Determination when Hubei tried to change the basis for a portion of Commerce's findings. Therefore, here, unlike *Grobest*, finality is an issue and Commerce did not abuse its discretion by not accepting Hubei's late submission.

II. Plaintiff Failed to Exhaust Its Administrative Remedies Regarding Insufficient Disaggregation in the Oceana Report

Plaintiff's primary argument against Commerce's Final Results is based on the alleged deficiencies of the South African Oceana Report financial statements. Specifically, Plaintiff argues: "Oceana's annual report was unsuitable for lacking of sufficient disaggregation. . . . Oceana Group's financials are not only missing one of the most important cost categories - raw material costs - but are also beset by other anomalies that potentially distort the calculation of financial ratios." Pl.'s Br. 5 (footnote omitted).

Commerce urges the court to disregard this argument because Xiping failed to exhaust its administrative remedies. As Commerce points out, "Neither Xiping, nor any other interested party, ever made this argument to Commerce during the administrative proceeding." Def.'s Br. 14. A review of the record, including Hubei's brief requesting

that Commerce accept the Thai financial statements, reveals no mention of insufficient disaggregation. *See* Hubei Br. 6–8. Unlike the issue of whether or not to permit the untimely submission of the Thai data, Commerce has had no opportunity to address the argument relating to disaggregation. The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court finds that Xiping and Hubei had ample opportunity to raise their concerns before the Department throughout the administrative proceedings. Therefore, the court does not reach the merits of this argument.

In addition, it is not clear that the Thai financials would be found to be the best available information even if they were on the record. In the 2013–2014 review of the underlying 1997 antidumping duty order, this Court approved Commerce's use of an earlier iteration of the Oceana Report instead of similar, Thai financial statements, when both were on the record. *See Weishan Hongda Aquatic Food Co. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1279 (2017), *aff'd,* 917 F.3d 1353 (Fed. Cir. 2019); *see also Weishan Hongda*, 917 F.3d at 1367 ("Commerce . . . found that the Thai Financial Statements suffered from distortions due to export subsidies, and . . . explained that the Oceana Report was 'a viable alternative,' while addressing the challenges made to the Oceana Report. . . . [Further,] Commerce was able to use its normal methodology to 'calculate appropriate financial ratios,' despite the Oceana Report's failure to 'provide disaggregated expenses for raw materials or labor cost.'"). Because the Thai financials in this case were not timely placed on the record, it is, of course, not possible to determine whether they would have constituted better information than the Oceana Report. The *Weishan Hongda* case, however, indicates that Xiping's hoped-for finding would not be guaranteed.

Finally, it is worth noting what this case is not. It is not a case where Xiping or Hubei went back and forth with Commerce as to how to answer questionnaires or with respect to what should be on the record. Rather, here, both Xiping and Hubei were aware that the Thai financials were available to put on the record, but neither party sought to do so until it was too late.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's Final Results. Judgment shall be entered accordingly.

Dated: April 26, 2019
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 19–52

POSCO, Plaintiff, and NUCOR CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., AK STEEL CORPORATION, ARCELORMITTAL USA LLC, UNITED STATES STEEL CORPORATION, HYUNDAI STEEL COMPANY, and GOVERNMENT OF KOREA, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 16–00227

[Sustaining the U.S. Department of Commerce's remand redetermination following a countervailing duty investigation of certain hot-rolled steel flat products from the Republic of Korea.]

Dated: May 1, 2019

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Eugene Degnan*, Morris, Manning & Martin LLP, of Washington, D.C., for Plaintiff POSCO and Defendant-Intervenors Hyundai Steel Company and the Government of Korea. *Sabahat Chaudhary* also appeared.

Alan H. Price, Christopher B. Weld, and *Adam M. Teslik*, Wiley Rein LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Nucor Corporation. *Cynthia C. Galvez, Derick G. Holt, Laura El-Sabaawi, Maureen E. Thorson, Stephanie M. Bell, Tessa V. Capeloto, Timothy C. Brightbill*, and *Usha Neelakantan* also appeared.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Melissa M. Brewer, Kathleen W. Cannon, Paul C. Rosenthal, R. Alan Luberda, and *Scott M. Wise*, Kelley Drye & Warren, LLP, of Washington, D.C., for Defendant-Intervenor ArcelorMittal USA LLC.

Daniel L. Schneiderman and *Stephen A. Jones*, King & Spalding, LLP, of Washington, D.C., for Defendant-Intervenor AK Steel Corporation.

Roger B. Schagrin, Christopher T. Cloutier, Elizabeth J. Drake, and *Paul W. Jameson*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Steel Dynamics, Inc.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

OPINION

Choe-Groves, Judge:

This case reviews the U.S. Department of Commerce's ("Commerce") methodology when selecting the highest calculated rate after applying facts otherwise available with an adverse inference ("adverse facts available" or "AFA") and Commerce's corroboration of those rates. Plaintiff POSCO ("POSCO") and Consolidated Plaintiff Nucor Corporation ("Nucor") initiated this action contesting various aspects of the final determination in a countervailing duty investigation, in which Commerce found that countervailable subsidies are

being provided to producers and exporters of certain hot-rolled steel flat products from the Republic of Korea ("Korea"). *See Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep't Commerce Aug. 12, 2016) (final affirmative determination), *as amended*, 81 Fed. Reg. 67,960 (Dep't Commerce Oct. 3, 2016) (amended final affirmative countervailing duty determination and countervailing duty order) (collectively, "*Final Determination*"). Before the court are the Final Results of Redetermination Pursuant to Court Remand, Nov. 13, 2018, ECF No. 100–1 ("*Remand Results*"), filed by Commerce as directed in the court's prior opinion. *See POSCO v. United States*, 42 CIT __, 337 F. Supp. 3d 1265 (2018) ("*POSCO I*"). For the reasons discussed below, the court sustains the *Remand Results* in full.

PROCEDURAL HISTORY

The court presumes familiarity with the facts of this case. *See POSCO I*. The court held that 19 U.S.C. § 1677e(d)(2)[1] requires Commerce to provide its reasoning when selecting the highest calculated AFA rate. *Id.* at __, 337 F. Supp. 3d at 1278–79. In this case, the two AFA rates applied to POSCO in the *Final Determination* were the 1.64% rate from *Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea*, 77 Fed. Reg. 17,410 (Dep't Commerce Mar. 26, 2012) (final affirmative countervailing duty determination) ("*Refrigerators From Korea*"), and the 1.05% rate from *Large Residential Washers From the Republic of Korea*, 77 Fed. Reg. 75,975 (Dep't Commerce Dec. 26, 2012) (final affirmative countervailing duty determination) ("*Washers From Korea*"). The court remanded Commerce's *Final Determination* with directions for Commerce to explain the basis for its decision. *POSCO I*, 42 CIT at __, 337 F. Supp. 3d at 1278–79. The court reserved consideration on the issue of corroboration. *Id.* at 1279.

Commerce filed its *Remand Results* on November 13, 2018. *See Remand Results*. On remand, Commerce continued to find that POSCO failed to act to the best of its ability in the administrative investigation and that the evidence on the record supported applying AFA to POSCO. *See id.* at 11–14. Because Commerce determined that POSCO failed to disclose certain information, Commerce concluded that "the record does not support the application of an alternative

[1] All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code. All further citations to the U.S. Code are to the 2012 edition, with exceptions. All further citations to 19 U.S.C. § 1677e are to the 2015 version, as amended pursuant to the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). All citations to the Code of Federal Regulations are to the 2015 edition.

rate to POSCO" and selected the highest calculated AFA rate. *Id.* at 14.

Although Commerce continued to find that selection of the highest calculated AFA rate was appropriate in this investigation, Commerce reevaluated the reliability of one of the previous rates. *See id.* at 17–18. Instead of using the 1.64% rate from *Refrigerators From Korea*, Commerce revised its calculation and selected only the 1.05% rate from *Washers From Korea*. *See id.* at 18. In corroborating the 1.05% rate from *Washers From Korea*, Commerce found that the rate was reliable because it was "a non-*de minimis* rate calculated for a cooperating Korean company in another [countervailing duty] proceeding for a similar program." *Id.* at 19. As a result, Commerce calculated a revised subsidy rate of 41.57% for POSCO. *Id.* at 24.

POSCO filed comments on the *Remand Results*. *See* Pl. POSCO's Comments U.S. Dep't Commerce's Nov. 13, 2018 Final Redetermination Pursuant Ct. Remand, Dec. 12, 2018, ECF No. 102 ("POSCO's Comments"). Nucor also filed comments on the *Remand Results*, supporting Commerce's explanation of its selection methodology but contesting the use of the revised 1.05% rate. *See* Nucor's Comments U.S. Dep't Commerce's Nov. 13, 2018 Final Redetermination Pursuant Remand 1, Dec. 13, 2018, ECF No. 103 ("Nucor's Comments"). Defendant United States filed a reply to the comments and in support of the *Remand Results*. *See* Def.'s Resp. Comments Remand Redetermination, Feb. 13, 2019, ECF No. 109.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

The two issues on remand are Commerce's selection of the highest calculated AFA rate and Commerce's corroboration.

I. Selection of the Highest Calculated AFA Rate

Commerce may apply AFA if a respondent does not cooperate "to the best of [its] ability, regardless of motivation or intent." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003). Commerce's selection of an AFA rate in a countervailing duty proceeding is a hierarchical methodology, as codified in the Trade Preferences

Extension Act of 2015. *See* 19 U.S.C. § 1677e(d)(1)(A). When selecting an AFA rate in a countervailing duty proceeding, Commerce may:

(i) Use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or

(ii) If there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use.

Id. When choosing an AFA rate under this statutory hierarchy, Commerce may select the highest calculated rate. *Id.* § 1677e(d)(2). Commerce must explain the basis for its selection by conducting a fact-specific inquiry and providing its reasons for selecting the highest calculated rate. *See id.*; *see also POSCO I*, 42 CIT at __, 337 F. Supp. 3d at 1278.

The court held in *POSCO I* that Commerce did not explain adequately its selection of the highest calculated rates (1.64% from *Refrigerators From Korea* and 1.05% from *Washers From Korea*) when applying AFA to POSCO in the *Final Determination*. *See POSCO I*, 42 CIT at __, 337 F. Supp. 3d at 1278. On remand, Commerce elaborated on its practice and explained that Commerce interprets 19 U.S.C. § 1677e(d)(2) "as an exception to the selection of an AFA rate" under 19 U.S.C. § 1677e(d)(1). *Remand Results* at 11. Commerce asserts that it is presumed to choose the highest calculated rate available unless Commerce determines, based on "unique and unusual facts on the record," that the highest calculated rate available within that step of its hierarchy is not appropriate. *Id.* Commerce reiterated the factors that led to the application of AFA to POSCO, including POSCO's failure to report information about its affiliated input suppliers, to provide information about its facility located in a free economic zone, and to report certain loans that its affiliated trading company received. *Id.* at 11–14. After re-evaluating the situation that led to the use of AFA, Commerce concluded that "the record does not support the application of an alternative rate to POSCO" and continued to use the highest calculated rate under the statute. *Id.* at 14.

POSCO does not believe that Commerce complied fully with the court's decision in *POSCO I*, but in the interest of a "speedy end to this litigation," defers to the court's discretion and refrains from commenting further. POSCO's Comments 2. POSCO does not articulate any specific grounds for challenging Commerce's alleged noncompliance with the court's decision. It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived. *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013); *see also JBF RAK LLC v. United States*,

38 CIT __, __, 991 F. Supp. 2d 1343, 1356 (2014), *aff'd*, 790 F.3d 1358 (Fed. Cir. 2015). Because POSCO fails to put forth substantive arguments for the court to weigh, it has waived its ability to contest Commerce's alleged noncompliance.

POSCO failed to raise any substantive issues with the *Remand Results* in the administrative proceedings before Commerce. *See Remand Results* at 21 (noting the lack of substantive comments from POSCO on the draft remand results). Notably, POSCO did not challenge Commerce's assertion that the agency may choose the highest calculated rate available by default unless Commerce determines, based on "unique and unusual facts on the record," that the highest calculated rate available is not appropriate. The court questions the validity of Commerce's position on this issue, but because POSCO did not exhaust its administrative remedies, the court will not examine this aspect of the *Remand Results* at this time. *See* 28 U.S.C. § 2637(d) (providing that this Court shall, where appropriate, require the exhaustion of administrative remedies); *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (explaining that, absent a strong contrary reason, parties should exhaust their remedies before the pertinent administrative agencies). The court sustains the *Remand Results* on the issue of Commerce's selection of the highest calculated AFA rate.

II. Corroboration

When relying on secondary information to select an AFA rate, Commerce has a statutory duty to corroborate the selected rate to the extent practicable. 19 U.S.C. § 1677e(c)(1). Secondary information includes information derived from the petition, a final determination in a countervailing duty investigation or antidumping investigation, or any other previous administrative review permitted under the statute. 19 C.F.R. § 351.308(c)(1). When Commerce corroborates secondary information, the threshold inquiry is whether the "secondary information to be used has probative value." *Id.* § 351.308(d). Commerce demonstrates probative value by showing that the selected rate is both reliable and relevant. *See Özdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1225, 1247 (2017) (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2015)).

Commerce selected and applied two AFA rates from previous countervailing duty investigations in the *Final Determination*: 1.64% from *Refrigerators From Korea* and 1.05% from *Washers From Korea*. *See POSCO I*, 42 CIT at __, 337 F. Supp. 3d at 1272. On remand, Commerce reconsidered the two AFA rates. Commerce found that the

1.64% rate was no longer reliable, in part due to a separate proceeding before this Court that addressed Commerce's use of the 1.64% rate for AFA purposes. *See Remand Results* at 17–18. Commerce decided to apply only the 1.05% rate in this investigation. *See id.* at 18. Commerce conducted a corroboration analysis for the 1.05% rate and explained that it found "[a]ctual rates based on actual usage by Korean companies" to be "reliable where they have been calculated in the context of an administrative proceeding." *Id.* at 19. Commerce prefers to "assign AFA rates that are the same in terms of the type of benefit," because those rates are relevant to the respondent, which means "that it is an actual calculated [countervailing duty] rate for a Korea program from which the companies could actually receive a benefit." *Id.* Commerce found that the 1.05% rate was reliable because it was "a non-*de minimis* rate calculated for a cooperating Korean company in another [countervailing duty] proceeding for a similar program." *Id.* Commerce provided a sufficient explanation for its corroboration of the selected AFA rate of 1.05% based on *Washers From Korea*. The court concludes that Commerce's corroboration is supported by substantial evidence.

Nucor argues that Commerce's decision to modify and corroborate the selected AFA rate as applied to POSCO exceeds the scope of the court's remand order. *See* Nucor's Comments 3. The court ordered Commerce to "select and properly justify the AFA rates applied to POSCO" consistent with its opinion. *POSCO I*, 42 CIT at __, 337 F. Supp. 3d at 1284. Because the AFA rates were subject to change, the court did not discuss corroboration at the time. *See id.* at __, 337 F. Supp. 3d at 1279. Commerce's selection and corroboration of the lower 1.05% rate derived from *Washers From Korea* on remand is reasonable in this case because Commerce articulated that the rate was derived from actual rates based on actual usage. The court ordered Commerce to reexamine its selection of the AFA rates, and Commerce followed its statutory duty under 19 U.S.C. § 1677e(c)(1) when it corroborated the modified rate. The court sustains Commerce's corroboration of the 1.05% rate applied to POSCO as AFA.

CONCLUSION

For the aforementioned reasons, the court sustains Commerce's *Remand Results* in full.

Judgment will be entered accordingly.

Dated: May 1, 2019
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 19–53

ONE WORLD TECHNOLOGIES, INC., Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION, and COMMISSIONER KEVIN K. MCALEENAN, Defendants, and the CHAMBERLAIN GROUP, INC., and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 19–00017

[Denying the U.S. International Trade Commission's motion for a stay pending appeal.]

Dated: May 2, 2019

Jason C. White, *Michael J. Abernathy*, and *Nicholas A. Restauri*, Morgan, Lewis & Bockius, LLP, of Chicago, IL, for Plaintiff One World Technologies, Inc.

Guy R. Eddon, *Amy M. Rubin*, and *Marcella Powell*, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., and E*dward F. Kenny* and *Alexander J. Vanderweide*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendants United States, U.S. Department of Homeland Security, U.S. Customs and Border Protection, and Acting Commissioner Kevin K. McAleenan. With them on the brief was *Joseph H. Hunt*, Assistant Attorney General. Of counsel was *Michael Heydrich*, Office of Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

Sidney A. Rosenzweig and *Carl P. Bretscher*, U.S. International Trade Commission, of Washington, D.C., for Defendant-Intervenor U.S. International Trade Commission.

Joseph V. Colaianni, Jr., *Benjamin Elacqua*, and *John T. Johnson*, Fish & Richardson, P.C., of Washington, D.C., Houston, TX, and New York, N.Y., for Defendant-Intervenor The Chamberlain Group, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

This case continues the ongoing litigation over garage door openers that were redesigned to avoid infringing a registered patent. Before the court is the Motion of the U.S. International Trade Commission ("ITC" or "Commission") to Stay the Preliminary Injunction and All Further Proceedings, March 13, 2019, ECF No. 91 ("Motion to Stay"). For the reasons that follow, the court denies the ITC's motion.

I. Procedural History

The court assumes familiarity with the facts of this case and only briefly discusses the procedural history. The court entered a preliminary injunction in this case on March 11, 2019. *One World Technologies, Inc., v. United States, et al.*, 43 CIT __ , Slip Op. 19–33 (Mar. 11, 2019), ECF No. 86; Order, Mar. 11, 2019, ECF No. 87. The preliminary injunction granted the requested relief in part, directing that the entries of redesigned garage door openers could not be seized. The

ITC filed a notice of appeal of this court's opinion and order on March 13, 2019. Notice of Appeal, Mar. 13, 2019, ECF No. 90. The Chamberlain Group, Inc. ("Chamberlain") filed a notice of appeal on March 19, 2019. Chamberlain's Notice of Appeal, Mar. 19, 2019, ECF No. 95. Defendants United States, United States Department of Homeland Security, United States Customs and Border Protection ("Customs"), and Commissioner Kevin K. McAleenan (collectively, "Defendants") filed a notice of appeal on April 17, 2019. Notice of Appeal, Apr. 17, 2019, ECF No. 144. The ITC filed the present Motion to Stay on March 13, 2019. Mot. to Stay, Mar. 13, 2019, ECF No. 91. Plaintiff One World Technologies, Inc. ("One World"), Defendants, and Chamberlain responded on April 3, 2019. One World's Opp'n to the ITC's Mot. to Stay, Apr. 3, 2019, ECF No. 121 ("One World's Response"); Defs' Resp. to the Mot. of the ITC to Stay the Prelim. Inj. & to Stay All Further Proceedings, Apr. 3, 2019, ECF No. 123 ("Defendants' Response"); Chamberlain's Resp. [in] Supp. of the ITC's Mot. to Stay the Ct.'s Prelim. Inj. & Further Proceedings, Apr. 3, 2019, ECF No. 127 ("Chamberlain's Response").

The ITC separately moved for a stay pending appeal in the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") on March 22, 2019. Non-Confidential Emergency Mot. of Appellant ITC to Stay the Trial Ct.'s Prelim. Inj. & Further Proceedings Below Until Subject Matter Jurisdiction is Established, *One World Technologies, Inc. v. United States*, No. 19–1663 (Fed. Cir.), ECF No. 6–1. The Federal Circuit denied the ITC's motion for a stay pending appeal on April 17, 2019. Order, *One World Technologies, Inc. v. United States*, No. 19–1663 (Fed. Cir.), ECF No. 37.

STANDARD OF REVIEW

A stay is an exercise of judicial discretion. *See Nken v. Holder*, 556 U.S. 418, 433 (2009). The party requesting a stay bears the burden of showing that circumstances justify an exercise of judicial discretion. *Id.* at 433–34.

DISCUSSION

The ITC argues that the circumstances justify a stay of the preliminary injunction. The court considers four factors in evaluating a motion for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest

lies." *Nken,* 556 U.S. at 434; *see also Nat. Res. Def. Council, Inc., v. Ross*, 42 CIT __ , __ , 348 F. Supp. 3d 1306, 1312 (2018).[1]

A. Stay Applicant's Showing of Likelihood of Success on the Merits

The ITC contends that it is likely to succeed on the merits of its appeal because the court's opinion did not sufficiently address jurisdictional objections. Mot. to Stay 3, Mar. 13, 2019, ECF No. 91. The ITC's Motion to Stay discusses the procedural history of this case but does not explain why the procedural history indicates that the ITC will be likely to succeed on the merits of its appeal. *Id.* at 2–3. The court allowed the ITC and Chamberlain to join the litigation and invited additional briefing from all Parties regarding jurisdiction. The court considered all submitted briefs and arguments regarding the issue of jurisdiction. The court finds that the ITC fails to meet its burden of making a "strong showing" of likelihood of success on the merits that the ITC will prevail on the jurisdiction issue.[2] The court finds that this factor does not weigh in favor of granting a stay pending appeal.

B. Applicant's Irreparable Injury Absent a Stay

The ITC argues that it will suffer irreparable injury to the administration of ITC orders if the preliminary injunction in this case is not stayed pending appeal. *See* Mot. to Stay 2, Mar. 13, 2019, ECF No. 91 (arguing the ITC will face irreparable harm). The ITC contends that the court's granting of the preliminary injunction, which ordered the Defendants to refrain from seizing the four entries of garage door openers at issue, would undermine the Commission's authority to modify its orders and would provide a road-map for infringers in future cases. *Id.* To the contrary, a separate, parallel proceeding seeking modification of the ITC's limited exclusion order is concurrently ongoing, thereby illustrating that this court's preliminary injunction enjoining seizure has not prohibited or interfered with the ITC's authority to modify its orders. This court reviews the actions taken by Customs with respect to the specific entries at issue, rather

[1] Defendants did not argue the factors for a stay pending appeal, but requested that the court defer consideration of the ITC's motion until completion of the appeals before the Federal Circuit. In the alternative, Defendants consented to the ITC's Motion to Stay. Defs.' Resp. 1–2, Apr. 3, 2019, ECF No. 123.

[2] Arguments by other Parties in support of the ITC do not weigh in favor of the ITC's likelihood of success on the merits. Chamberlain argues that the U.S. Court of International Trade lacks jurisdiction in this matter and the court did not consider the merits of the injunction. *See* Chamberlain's Resp. 2, Apr. 3, 2019, ECF No. 127. One World responds that the ITC "does not even allege that this [c]ourt made any legal errors when granting the preliminary injunction." One World's Resp. 3–4, Apr. 3, 2019, ECF No. 121 (arguing that the ITC has not demonstrated a likelihood of success on the merits).

than opines about any actions taken by the ITC. In addition, the ITC has already appealed the preliminary injunction decision to the Federal Circuit. Notice of Appeal, Mar. 13, 2019, ECF No. 90. The ITC does not explain how the claimed injury would be irreparable if the ITC is able to seek relief from the Federal Circuit. Absent a showing of why the injury would be irreparable absent a stay, the court finds that this factor does not weigh in favor of granting a stay pending appeal.[3]

C. Whether Issuance of a Stay Will Substantially Injure the Other Parties

The ITC's request for a stay of the preliminary injunction is, in effect, a request to rescind the preliminary injunction in this case. In evaluating Plaintiff's request for a preliminary injunction, the court found that Plaintiff would suffer irreparable harm. *See One World Techs, Inc.*, 43 CIT at __ , __ , at *27–*30, *32, Slip Op. 19–33 (Mar. 11, 2019), ECF No. 86. In the present motion, the ITC argues that the harm facing One World is not irreparable. *See* Mot. to Stay 4, Mar. 13, 2019, ECF No. 91 (discussing the "balance of hardships"). One World counters that it demonstrated irreparable harm when it sought the preliminary injunction. One World's Resp. 6, Apr. 3, 2019, ECF No. 121. Chamberlain argues that One World will not be substantially injured by a stay, even if Customs seizes One World's merchandise. Chamberlain's Resp. 9, Apr. 3, 2019, ECF No. 127. The court disagrees and notes that seizure of the merchandise at issue would cause substantial injury to One World, a party interested in the proceeding. The court finds that this factor does not weigh in favor of granting a stay.

D. Public Interest

The ITC argues that the public interest supports the appropriate exercise of the court's jurisdiction and the enforcement of ITC orders. Mot. to Stay 4, Mar. 13, 2019, ECF No. 91. One World counters that the enforcement of the ITC's orders is not implicated because "the preliminary injunction in no way modifies or rescinds the [ITC]'s orders." One World's Resp. 5, Apr. 3, 2019, ECF No. 121. Chamberlain

[3] The ITC argues that One World is "providing a road-map for infringers in future cases, irreparably harm[ing] the [ITC]'s statutory functions." Mot. to Stay 2, Mar. 13, 2019, ECF No. 91. It is not clear how a stay pending appeal would mitigate or eliminate the ITC's asserted injury. Arguments by other Parties in support of the ITC do not demonstrate that the ITC will face irreparable injury absent a stay. Chamberlain does not explain how potential harms faced by the ITC are irreparable. Chamberlain's Resp. 6–7, Apr. 3, 2019, ECF No. 127. Chamberlain also contends that it will face irreparable harm as a result of the preliminary injunction. *Id.* at 7–9. The issue before the court is whether the stay applicant, the ITC, will face irreparable injury absent a stay. Chamberlain is not the stay applicant for this motion.

argues, *inter alia*, that the ITC's ongoing modification proceeding warrants a stay in the present action. Chamberlain's Resp. 9, Apr. 3, 2019, ECF No. 127. The existence of a parallel proceeding arising out of a separate jurisdictional basis, *i.e.*, a modification proceeding at the ITC, does not demonstrate a public interest weighing for or against a stay in this action. The court finds that the public interest is neutral.

CONCLUSION

Based on the foregoing analysis, the court concludes that the ITC does not meet its burden for a stay. A stay of the preliminary injunction and all other proceedings in this matter is not warranted as: (1) the ITC has not demonstrated a "strong showing" of likelihood of success on the merits, (2) the ITC has not demonstrated that it will be irreparably injured absent a stay in this action, (3) the issuance of a stay would substantially injure another party, the Plaintiff, and (4) the public interest is neutral. *See Nken,* 556 U.S. at 434.

Upon consideration of all papers and proceedings in this action, it is hereby

ORDERED that the ITC's Motion to Stay, Mar. 13, 2019, ECF No. 91, is denied.

Dated: May 2, 2019
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE